ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE (E-SIGN) ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 1714

SEPTEMBER 30, 1999

Serial No. 3

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

62-448 WASHINGTON : 2000

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-060280-7

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ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE (E-SIGN) ACT

THURSDAY, SEPTEMBER 30, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:08 a.m., in Room 2237, Rayburn House Office Building, Hon. Howard Coble [chairman of the subcommittee] Presiding.

Present: Representatives Hon. Howard Coble, James F. Sensenbrenner, Jr., Bob Goodlatte, Howard L. Berman and William D. Delahunt.

Staff Present: Mitch Glazier, Chief Counsel; Debbie Laman, Counsel; Eunice Goldring, Professional Staff Member; Cori Flam, Minority Counsel; and Stacy Baird, Legislative Fellow.

OPENING STATEMENT OF CHAIRMAN HOWARD COBLE

Mr. COBLE. Good morning, ladies and gentlemen. The subcommittee will come to order.

I am told that Mr. Berman is on his way, and I don't want to penalize those of you who have made the effort to get here on time. Howard will be here imminently, and I am sure others will join us as the morning develops.

Today, we are here to discuss H.R. 1714, the Electronic Signatures in Global and National Commerce Act, known popularly as the E-Sign Act.

[The bill, H.R. 1714, follows:]

106TH CONGRESS
1ST SESSION

H. R. 1714

To facilitate the use of electronic records and signatures in interstate or foreign commerce.

IN THE HOUSE OF REPRESENTATIVES

MAY 6, 1999

Mr. BLILEY (for himself, Mr. DAVIS of Virginia, Mr. TAUZIN, Mr. OXLEY, Mr. TOWNS, and Mr. FOSSELLA) introduced the following bill; which was referred to the Committee on Commerce

A BILL

To facilitate the use of electronic records and signatures in interstate or foreign commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Electronic Signatures in Global and National Commerce Act".

TITLE I—VALIDITY OF ELECTRONIC RECORDS AND SIGNATURES FOR COMMERCE

SEC. 101. GENERAL RULE OF VALIDITY.

(a) GENERAL RULE.—With respect to any contract or agreement entered into in or affecting interstate or foreign commerce—

(1) no statute, regulation, or other rule of law shall deny the legal effect of such contract or agreement on the ground that the instrument is not in writing if the instrument is an electronic record; and

(2) no statute, regulation, or other rule of law shall deny the legal effect of such contract or agreement on the ground that the contract or agreement is not signed or is not affirmed by a signature if the contract or agreement is signed or affirmed by an electronic signature.

(b) AUTONOMY OF PARTIES IN COMMERCE.—With respect to any contract or agreement entered into in or affecting interstate or foreign commerce, the parties to such contract or agreement may establish reasonable requirements regarding the types of electronic records and electronic signatures acceptable to such parties.

SEC. 102. AUTHORITY TO ALTER OR SUPERSEDE GENERAL RULE.

(a) IN GENERAL.—Except as provided in subsection (b), a Federal or State statute, regulation, or other rule of law enacted or adopted after the date of enactment of this Act may modify, limit, or supersede the provisions of section 101 if—

(1) such statute, regulation, or rule makes specific reference to the provisions of section 101;

(2) specifies the alternative procedures or requirements for the use of electronic records or electronic signatures to establish the legal validity of contracts or agreements; and

(3) in the case of a State statute, regulation, or other rule of law, is enacted or adopted within 2 years after the date of enactment of this Act.

(b) EFFECT ON OTHER LAWS.—A State statute, regulation, or other rule of law that modifies, limits, or supersedes section 101 shall not be effective to the extent that such statute, regulation, or rule—

(1) discriminates in favor of or against a specific technology, method, or technique of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures;

(2) discriminates in favor of or against a specific type or size of entity engaged in the business of facilitating the use of electronic records or electronic signatures;

(3) is not based on specific and publicly available criteria; or

(4) is otherwise inconsistent with the provisions of section 101.

(c) ACTIONS TO ENJOIN.—Whenever it shall appear to the Secretary of Commerce that a State has enacted or adopted a statute, regulation, or other law that is prohibited by subsection (b), the Secretary may bring an action to enjoin the enforcement of such statute, regulation, or rule, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

SEC. 103. SPECIFIC EXCLUSIONS.

The provisions of section 101 shall not apply to—

(1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts; or

(2) a statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law.

SEC. 104. DEFINITIONS.

For purposes of this title:

(1) ELECTRONIC RECORD.—The term "electronic record" means a writing, document, or other record created, stored, generated, received, or communicated by electronic means.

(2) ELECTRONIC SIGNATURE.—The term "electronic signature" means a signature in electronic form, attached to or logically associated with an electronic record, that—

(A) is intended by the parties to signify agreement to a contract or agreement;

(B) is capable of verifying the identity of the person using the signature; and

(C) is linked to the electronic record in a manner that prevents alteration of the record after signature.

(3) ELECTRONIC.—The term "electronic" means of or relating to technology having electrical, digital, magnetic, optical, electromagnetic, or similar capabilities regardless of medium.

TITLE II—DEVELOPMENT AND ADOPTION OF ELECTRONIC SIGNATURE PRODUCTS AND SERVICES

SEC. 201. TREATMENT OF ELECTRONIC SIGNATURES IN INTERSTATE AND FOREIGN COMMERCE.

(a) INQUIRY REGARDING IMPEDIMENTS TO COMMERCE.—

(1) INQUIRIES REQUIRED.—Within 90 days after the date of the enactment of this Act, and annually thereafter, the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall complete an inquiry to—

(A) identify any domestic and foreign impediments to commerce in electronic signature products and services and the manners in which and extent to which such impediments inhibit the development of interstate and foreign commerce;

(B) identify constraints imposed by foreign nations or international organizations that constitute barriers to providers of electronic signature products or services; and

(C) identify the degree to which other nations and international organizations are complying with the principles in subsection (b)(2).

(2) SUBMISSION.—The Secretary shall submit a report to the Congress regarding the results of each such inquiry within 90 days after the conclusion of such inquiry.

(b) PROMOTION OF ELECTRONIC SIGNATURES.—

(1) REQUIRED ACTIONS.—The Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall promote the acceptance and use, on an international basis, of electronic signatures in accordance with the principles specified in paragraph (2) and in a manner consistent with section 101 of this Act. The Secretary of Commerce shall take all actions necessary in a manner consistent with such principles to eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic signatures, including those identified in the inquiries under subsection (a) for the purpose of facilitating the development of interstate and foreign commerce.

(2) PRINCIPLES.—The principles specified in this paragraph are the following:

(A) Free markets and self-regulation, rather than government standard-setting or rules, should govern the development and use of electronic records and electronic signatures.

(B) Neutrality and nondiscrimination should be observed among providers of and technologies for electronic records and electronic signatures.

(C) Parties to a transaction should be permitted to establish reasonable requirements regarding the types of electronic records and electronic signatures acceptable to such parties.

(D) Electronic records and electronic signatures in a form acceptable to the parties should not be denied legal validity on the ground that they are not in writing.

(E) De jure or de facto imposition of standards on private industry through foreign adoption of regulations or policies with respect to electronic records and electronic signatures should be avoided.

(c) FOLLOWUP STUDY.—Within 3 years after the date of enactment of this Act, the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall conduct an inquiry regarding any State statutes, regulations, or other rules of law enacted or adopted after such date of enactment pursuant to section 102(a), and the extent to which such statutes, regulations, and rules comply with section 102(b). The Secretary shall submit a report to the Congress regarding the results of such inquiry by the conclusion of such 3-year period and such report shall identify any actions taken by the Secretary pursuant to section 102(c) and subsection (b) of this section.

(d) CONSULTATION.—In conducting the activities required by this section, the Secretary shall consult with users and providers of electronic signature products and services and other interested persons.

TITLE III—USE OF ELECTRONIC RECORDS AND SIGNATURES UNDER FEDERAL SECURITIES LAW

(a) AMENDMENT.—Section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c) is amended by adding at the end the following:

"(h) REQUIREMENTS RELATING TO WRITTEN DOCUMENTS AND SIGNATURES.—

"(1) USE OF ELECTRONIC RECORDS AND SIGNATURES.—Notwithstanding any State statute, regulation, or rule of law, whenever in the securities laws, or in the rules or regulations thereunder (including the rules of any self-regulatory organization)—

"(A) a contract, agreement, or record (as defined in subsection (a)(37)) is required to be in writing, or is required to be authenticated by means of an instrument in writing, the legal effect of such contract, agreement, or record shall not be denied on the ground that the instrument is not in writing if the instrument is an electronic record; and

"(B) a contract, agreement, or record is required to be signed, the legal effect of such contract, agreement, or record shall not be denied on the ground that contract, agreement, or record is not signed or is not affirmed by a signature if the contract, agreement, or record is signed or affirmed by an electronic signature.

"(2) AUTHORITY OF COMMISSION.—Notwithstanding any State statute, regulation, or rule of law, the Commission may, consistent with the public interest and the protection of investors, prescribe regulations to carry out this subsection, but such regulations shall not—

"(A) discriminate in favor of or against a specific technology, method, or technique of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; or

"(B) discriminate in favor of or against a specific type or size of entity engaged in the business of facilitating the use of electronic records or electronic signatures.

"(3) DEFINITIONS.—The terms 'electronic record' and 'electronic signature' have the meanings provided such terms by section 104 of the Electronic Signatures In Global and National Commerce Act.".

○

Mr. COBLE. In the past few years, the use of the Internet to conduct business, or e-commerce, has exploded beyond prediction. It is expected that the near future will see even more growth in e-commerce as more and more people go on-line to buy, sell, trade, or make other business arrangements. Important to the success of e-commerce is the ability to enter into a contract on-line that is legally binding. Therefore, it has become necessary to update contract laws which require a physical document to be signed by the party to allow for electronic signatures to have the same legal effect as a physically-signed piece of paper, or a tangible instrument.

Many States have enacted laws to give legal effect to electronic signatures. However, these laws are not identical, and some States have not enacted similar legislation. Industry representatives assert that the differences and the lack of legislation between States are an impediment to the growth of e-commerce because parties will be unwilling to risk entering into a contract on-line without nationwide certainty regarding its legality. This has led to widespread discussion on the need for uniform Federal and State laws regarding electronic signatures in order to promote e-commerce in the United States and to provide a model for other countries.

In order to accomplish this, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Electronic Transactions Act.

H.R. 1714 also intends to accomplish this objective. However, there are some potential problems with H.R. 1714. There is concern about the dramatic effects H.R. 1714 could have on the Federal courts and the Department of Justice. It allows an action in Federal court for an injunction against enforcement of a State statute that the Secretary of Commerce determines does not comply with the Act. Because H.R. 1714 would forever preempt State law, there is a concern that it may well be overly preemptive.

In addition to H.R. 1714, there is a corresponding proposal that addresses electronic signatures, S. 761, the Millenium Digital Commerce Act, introduced by Senator Abraham. The bill only preempts State law in States that have not adopted the UETA. That approach may have fewer consequences on the courts and the States because it incorporates the provisions in UETA regarding admissibility and other aspects.

The subcommittee hearing will focus on the differences in the above three approaches to help determine which approach has the most benign effects on Federal-State relations, the judiciary, the legal effect of contracts, the Department of Justice, and Rules of Procedure and Evidence. The subcommittee should consider all approaches in determining the best method for preserving e-commerce while avoiding unintended consequences on the judicial system.

The ubiquitous Mr. Berman has joined us. He is in many places at one time, I am told.

Howard, it is good to have you with us.

I recognize the gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you. I am being digitally moved here.

I want to thank the chairman for his effort to bring this legislation before our subcommittee. It is an issue that fully deserves our attention as it pertains directly to the enforceability of contracts and the evidentiary implications of the Internet.

Legislation in this area is extremely important. Electronic signatures are a critical tool in assuring the maintenance of the integrity of our computer systems, the security of the Internet, and of our critical infrastructure from intrusion.

Electronic signatures will facilitate the development of public and personal trust in this new medium for transacting business. Ensuring the legal enforceability of electronic documents is of utmost importance as we move toward a paperless society. Laws effectuating the use of electronic signatures and electronic records

will impact on every kind of transaction, from banking to investments to the purchase of insurance. From buying a new TV to complex business-to-business transactions, there are few transactions that will not soon regularly be memorialized solely with electronic documentation.

This is a great and substantial change in the way we are creating legally binding relationships. Federal legislation in this area must be carefully and purposefully crafted. It is for this reason that I express some concerns about H.R. 1714 at the outset.

H.R. 1714, although clearly well-intentioned, is overly broad and reaches deep into the areas of law that throughout this country's history have successfully been left to the States. Laws governing commercial transactions and contracts are fundamentally successes of our legal system, notably through the adoption of every State of the UCC. I urge continued adherence to this model.

I agree there may be a need for Federal law to fill in where State law has yet to develop, but this legislation goes beyond that. Through circular drafting and contradictory provisions, this bill imposes in perpetuity Federal law on the States, even where they adopt the Uniform Electronic Transaction Act.

Another bill, S. 761, is far less expansive, yields to State law, and accords much greater deference to the drafters of the UETA, who this past summer, after considering the issues for over 2 years, produced a uniform code that has already been adopted by my own State of California and is being considered by several other States for prompt adoption.

I know that the administration looks favorably upon this bill, and I hope this subcommittee will seriously examine it. I want to note, however, that I have concerns that arise in regard to both bills, particularly as to the potential adverse impacts on consumers.

According to the Department of Commerce, in 1998, although approximately 40 percent of households had computers, only 25 percent were connected to the Internet. Although the rate of growth of connectivity is increasing, so is the disparity between who is and who is not connected. Overwhelmingly, the connected are the younger and more wealthy. We cannot legislate in this area without keeping in mind that 90 to 95 percent of families with an annual household income of less than $25,000 do not have Internet access. In 1998, only about 14 percent of households with incomes of between $25,000 and $35,000 had Internet access.

This legislation reaches into every corner of daily life. Legal obligations and rights, contracts, one's own signature, these are of as great an importance to the elderly, poor, and middle class as they are to the wealthy.

Finally, this legislation is not only about facilitating the growth of the Internet or e-commerce, this legislation is about legal documents. Ultimately, we must answer the question of what will be enforceable in court, what will be admissible into evidence, can we be confident that a document was not altered since the time it was executed, can we identify a date upon which the agreement was entered to determine the applicability of the statute of limitations. These are only some of the questions we must answer as we examine how the law can support a transition from paper to electronic documentation.

I look forward to the testimony of the witnesses on both pieces of legislation.

Mr. COBLE. I thank the gentleman.

Does the gentleman from Massachusetts have a statement?

Mr. DELAHUNT. No, I don't.

Mr. COBLE. Good to have you with us.

Our first witness this morning will be Mr. Andrew Pincus, who, as the General Counsel, is the chief legal adviser for the Commerce Department. Mr. Pincus has already served as a legal adviser to the Secretary and the Department on a broad range of domestic and international issues.

Mr. Pincus holds a bachelor of law degree from Yale College, where he was graduated cum laude, and a law degree from the Columbia University School of Law.

Our second witness on this panel is Mr. Ivan Fong, who serves as Deputy Associate Attorney General in the Department of Justice. He assists and advises the Associate Attorney General and other senior Department officials on a wide range of issues, including technology and e-commerce issues.

Mr. Fong is also an adjunct professor at the Georgetown University Law Center, where he co-teaches a seminar on law and new technology.

The subcommittee has copies of the witnesses' testimony, which, without objection, will be made part of the record.

Mr. Pincus, we will start with you.

I would like to remind you and Mr. Fong, if I may, that we operate under the 5-minute rule. When that red light illuminates in your eyes, you are on notice.

We have your written statements, and they, I assure you, have been read and will be reread. So it is good to have both of you with us.

Mr. COBLE. Mr. Pincus.

STATEMENT OF ANDREW PINCUS, GENERAL COUNSEL, U.S. DEPARTMENT OF COMMERCE

Mr. PINCUS. Thank you, Mr. Chairman. It is an honor to appear before the subcommittee on this very important issue.

As you said, Mr. Chairman, the evidence is clear that electronic commerce is going to be a key driver of our economy as we move into the next millennium. Recognizing this, President Clinton and Vice President Gore in July, 1997, issued the Framework for Global Electronic Commerce which discusses the potential of this new medium and identifies the crucial policy issues that we believe have to be addressed for e-commerce to realize its potential.

One of these is the development of a uniform commercial legal framework that recognizes, facilitates, and enforces electronic transactions worldwide, because, obviously, as both you and Mr. Berman said, we cannot have electronic commerce without legally binding electronic agreements. The President directed Secretary Daley to oversee the Administration's efforts with regard to this issue.

My statement discusses what we are doing in the Internet arena, and I thought I would focus my oral testimony on the domestic questions that are the focus of the subcommittee's interest.

As the subcommittee knows, commercial law has historically been the province of the States; and the States, working together through the uniform law process, have developed a uniform commercial code governing commercial transactions that is truly the envy of the world in terms of setting a stable, clear framework under which commercial transactions can be entered into.

That uniform law process, as you mentioned, has gone forward with respect to updating those principles for the new electronic era, and the National Conference of Commissioners on Uniform State Laws last July approved the Uniform Electronic Transactions Act, which is designed to ensure that electronic contracting can occur and can create legally binding obligations.

As I said, that has been sent to the States. One State has acted, and we understand that a number of States are going to be considering the legislation this year.

Although we believe that there is no reason to supplant the States as the primary sources of commercial law, the Administration has concluded that it is appropriate for the Federal Government to intervene in a limited way while the adoption process is under way to assure that in that interim period there is no doubt about the legal enforceability of electronic contracts. Thus, we agree with the basic purpose of H.R. 1714, but we have significant concerns about how that purpose is implemented in the legislation.

One of our concerns that Mr. Fong will address in more detail is that the bill extends beyond private commercial transactions to government transactions. Another of our concerns is that the bill has a continuing preemptive effect.

We think the best way to address this matter is to provide an interim rule that sunsets as States implement the UETA into their own law. That way, we will have served the goal of creating a transition, but we won't have duplicative Federal rules and State rules continuing at the same time, which could cause questions about the extent to which any State enactment of the UETA is preempted by whatever residual preemption there is in the Federal law and actually could undermine the principal goal of the legislation, which is to create certainty.

We also have concern about the breadth of the bill's preemption provisions. Some aspects of the bill, especially the party autonomy provision, go beyond contract formation to the use of electronic records in the carrying out of a contract. We have concerns that that might allow parties to circumvent regulatory rules such as notice and disclosure rules applicable to consumer transactions that are very important in the physical world because they protect consumers against unfairness and clearly have to be carried forward into this new electronic world.

Finally, the bill provides that the Secretary of Commerce may seek an injunction against State laws that are preempted. That, too, we think is not really a necessary element of the legislation. In our view, these issues will arise in private litigation when there are disputes about the validity or applicability of particular contracts.

In that case, whichever party is trying to defeat the State rule can raise the preemption issue and it can be litigated there. We don't think the government has a role. We don't have the resources

to supervise State laws and see what should be in and what should be out. In fact, it would be unfortunate if the Secretary's failure to act were to be construed as somehow validating a State law that is in effect.

Thank you very much, Mr. Chairman. That red light has appeared.

Mr. COBLE. I don't want to imply to you all that you will be keelhauled if you continue. If you are in the middle of a sentence, please continue.

Mr. PINCUS. To finish that thought, we think that provision could, again, create more uncertainty, instead of resolving it.

There is also the issue that, of course, the Commerce Department cannot litigate on its own. Our lawyers are at the Justice Department. So if there were to be such a provision, we think it should be structured so that the Attorney General, on behalf of the Secretary, would institute that kind of litigation.

Mr. COBLE. Thank you, Mr. Pincus.

[The prepared statement of Mr. Pincus follows:]

PREPARED STATEMENT OF ANDREW PINCUS, GENERAL COUNSEL, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman, members of the Subcommittee, thank you for inviting me to testify today about H.R. 1714, the "Electronic Signatures in Global and National Commerce Act." My statement addresses the Administration's views concerning only titles I and II of the bill.

H.R. 1714 addresses important concerns associated with electronic commerce and the rise of the Internet as a worldwide commercial forum and marketplace. The Internet is revolutionizing every aspect of business, not just in the United States, but throughout the world. Although still a small percentage of our total economy, the volume of commerce conducted over the Internet is growing exponentially. In early 1998, experts estimated that Internet retailing might reach $7 billion by the year 2000. This level was probably exceeded last year, and forecasters now project on-line retail sales greater than $40 billion by 2002. As to overall electronic commerce, we noted in last year's Emerging Digital Economy Report that forecasters were suggesting a possible level of $300 billion by 2002. Already that estimate is seen by experts as low, with Forrester Research estimating total electronic commerce (including business-to-business activity) as reaching $1.3 trillion by 2003.

President Clinton and Vice President Gore, in issuing the Framework for Global Electronic Commerce in July 1997, noted that "[m]any businesses and consumers are still wary of conducting extensive business over the Internet because of the lack of a predictable legal environment governing transactions." Both Congress and the Administration have been working to address this important potential impediment to commerce. As part of the Administration's effort, President Clinton directed Secretary Daley to "work with the private sector, State and local governments, and foreign governments to support the development, both domestically and internationally, of a uniform commercial legal framework that recognizes, facilitates, and enforces electronic transactions worldwide." The Framework identified several key principles to guide the drafting of applicable legal rules:

- parties should be free to order the contractual relationship between themselves as they see fit;
- rules should be technology-neutral (*i.e.*, the rules should neither require nor assume a particular technology) and forward looking (*i.e.*, the rules should not hinder the use or development of technology in the future);
- existing rules should be modified and new rules should be adopted only as necessary or substantially desirable to support the use of electronic technologies; and
- the process should involve the high-tech commercial sector as well as businesses that have not yet moved online.

The basic legal *Framework* needed to enable electronic transactions in a commercial context consists of two essential elements. First is the elimination of statutory rules requiring paper contracts. There is a broad consensus that—with the exception

of a few specialized agreements (wills and property deeds, for example)—parties' electronic agreements should have the same legal status as paper agreements.

The second element involves when and how an electronic commercial contract becomes legally binding on, and therefore enforceable in court against, a person or entity that is a party to the contract. In the off-line world, the key question is whether a party has manifested its intent to be bound by the contract, which generally occurs through a written record, and often, affixing a written signature to that written record. A signature, however, often is not a legal requirement (for example, a binding contract may be formed through an exchange of telegrams). The issue is, how can we apply and use long-standing commercial principles in connection with transactions in cyberspace?

As in the off-line world, a party to an electronic transaction may use any of a variety of methods to evidence his identity or his agreement to the terms of a contract—a function that has come to be termed "electronic authentication." He might type his name at the end of an e-mail message containing the terms of the agreement. He could end a message with a previously agreed code-word, or with an electronic facsimile of his written signature created by his personal use of an electronic stylus. He might also "sign" the message using some digital signature technology or some biometric technology. Moreover, these technology models are evolving rapidly, and further authentication technologies will doubtless be created. The private sector today is using many forms of electronic authentication.

One other variable is important in understanding the legal standards governing electronic authentication. When electronic commerce was first beginning, some observers imagined a world in which everyone would have a unique digital identifier in a universally recognized format that would be used to authenticate his or her electronic transactions. Each individual could surf the Internet and enter into transactions with anyone he encountered, confident that the other party's digital identifier provided a legally valid means of identifying that party in the event the transaction ended up in court.

Although the future may see both a market and the infrastructure necessary for a comprehensive, real-time authentication system, such a system does not exist now and will not likely be in operation very soon. Most electronic transactions now occur in "closed systems" in which parties already related to each other in some way conduct electronic transactions under a mutually agreed system. Sophisticated versions of this model are found in sectors ranging from manufacturing to the banking and financial services industries where commercial parties establish the technological approach they will rely on as well as their rules for operating, assigning risk and settling disputes. In the manufacturing sector, for example, the three major U.S. auto makers are developing a global system to tie product development together with more than 15,000 suppliers operating around the world.

Since 1997, the Commerce Department has been working to carry out our Presidential mandate to promote an appropriate international legal framework *for electronic commerce. At the same time, the National Conference of Commissioners of Uniform State Law (NCCUSL), after a two-year effort by experts in commercial law, has completed a model "Uniform Electronic Transactions Act" (UETA) to establish a predictable, minimalist* framework *for legal recognition of electronic records and electronic signatures. The UETA was approved by NCCUSL in July of this year and has been submitted to the States for adoption. California already has adopted its version of the measure. Other States' consideration of the UETA is active, and when adopted in some form by all of the States, we believe that the UETA will provide both an excellent domestic legal* framework *for electronic transactions and a model for the rest of the world. The UETA is generally enabling, not prescriptive, as it requires no one to enter into electronic contracts but merely supports electronic transactions when people wish to interact in this way. It is also technologically neutral.*

In the international arena our focus is on promoting our principles of minimalism and facilitation (as opposed to governmental mandates and regulation) as the basis for enabling electronic commerce worldwide. The 1966 UNCITRAL Model Law on Electronic Commerce reflects a broad consensus that communication of legally significant data in electronic form is often hindered by legal obstacles to the use of such data, or by uncertainty as to their legal effect or validity. The Model Law sets out internationally acceptable rules to remove such legal obstacles and support a more secure legal environment for electronic commerce across national borders. We are pleased that our States decided to build on this international consensus in developing the UETA.

Despite this theoretical consensus, however, at least two different legal models for electronic authentication are developing internationally. The first, represented by the UETA and the UNCITRAL Model Law, eliminates barriers to electronic agree-

ments and electronic signatures without granting special legal status to any particular type of authentication.

The second model involves a greater degree of government regulation. Under that model, a government creates a preference for one or more particular types of electronic authentication by establishing specific technical requirements for electronic signatures—often providing a legal presumption that electronic contracts signed using the stated methodology are binding. The European Union's Electronic Signatures Directive, now in the final stages of consideration by the E.U. Parliament, follows this approach. I do not mean to suggest that techniques typical of this "second" approach are never appropriate for particular issues, but only that they should be reserved for specific categories of transactions where the public interest requires direct government oversight. The prescriptive approach, in our view, should not be adopted as a general rule.

Since July 1997, we have been encouraging other countries, regardless of which approach they adopt, to include provisions in their laws assuring parties that their transactions involving electronic authentication will be recognized and enforced—so that ultimately such legal recognition will be worldwide. Under this approach, countries would: (1) eliminate paper-based legal barriers to electronic transactions by implementing the relevant provisions of the 1996 UNCITRAL Model Law on Electronic Commerce; (2) reaffirm the rights of parties to determine for themselves the appropriate technological means of authenticating their transactions; (3) ensure any party the opportunity to prove in court that a particular authentication technique is sufficient to create a legally binding agreement; and (4) treat technologies and providers of authentication services from other countries in a non-discriminatory manner.

We have been successful in encouraging the adoption of this approach in a variety of multilateral and bilateral contexts. In October 1998, the OECD Ministers approved a Declaration on Authentication for Electronic Commerce affirming these principles. Further, the Global Business Dialogue on Electronic Commerce (GBDe), a global private sector initiative, recently issued a recommendation to governments that strongly embraces this approach. In addition, we negotiated joint statements affirming these principles with several important trading partners, including France, Japan, Korea, Ireland, Australia and the United Kingdom. Further, we have asked UNCITRAL to consider a binding international convention on electronic transactions that would embody these principles.

The Administration supports legislation that promotes a predictable, minimalist legal environment for electronic commerce and encourages prompt state adoption of uniform legislation assuring the legal effectiveness of electronic transactions and signatures. Although we appreciate the significant work of the House Committee on Commerce to address the Administration's concerns with H.R. 1714, we oppose this bill in the form in which it was reported by the House Commerce Committee. I would like to summarize the principal areas of concern.

Title I of the bill focuses on the domestic legal standards governing electronic contracts. *First*, we are concerned that the bill extends to government transactions (Federal and State), not simply agreements between private entities. We have strongly urged that H.R. 1714 be revised to exclude governmental transactions. The Administration believes that governments should use electronic commerce to the maximum extent feasible in their dealings with citizens. That is why we supported—and are working hard to implement—the Government Paperwork Elimination Act (GPEA), title XVII of Public Law 105–277, the goal of which was to increase the ability of citizens to interact with the Federal Government electronically.

We do not believe that additional legislation is needed at this time to promote the use of electronic commerce by governments. And we are extremely concerned that provisions designed principally to eliminate legal barriers to electronic transactions between private parties would be counterproductive if applied to the marketplace activities of governments. For example, the GPEA recognizes that the Federal Government should not dictate authentication standards to the private sector and guards against this possibility by specifically requiring that government standards be compatible with those used by commerce and industry. The GPEA also requires that agencies, where practicable, adopt multiple optional means whereby citizens and businesses can transact business with them. The agencies, under OMB guidance, are working diligently to implement these mandates. But government should not be forced to transact its business and accept records by any means, and according to any standard, that may be available to someone at a given moment. Such a requirement, which could be read into H.R.1714 in its present form, would be extremely expensive and inefficient, as well as inconsistent with the fulfillment of important goals involving the security and permanence of government information and records. The GPEA recognizes this important consideration, while at the same time ensuring that the government cannot dictate its preferred standards or methods to

the private sector or use its substantial information technology purchasing power to dominate the private marketplace.

Second, Section 102 of H.R. 1714 places significant, and we believe inappropriate, limits upon the States' ability to alter or supersede the federal rule of law that the bill would impose. This legislation should be limited to a temporary federal rule to ensure the validity of electronic agreements entered into before the States have a chance to enact the UETA. Once the UETA is adopted by a State, the federal rule would be unnecessary and should "sunset," leaving the transaction to be governed by state law. As the bill is now drafted, States' laws would remain subject to federal preemption even when those States adopt the UETA "to the extent" that any State rule—including the UETA—fails to meet a number of criteria, which in themselves are not clearly defined. Most significantly, subsection (b) of Section 102, "Effect on Other Laws," takes away the authority of states to avoid federal preemption that is granted by subsection (a) of that section. For example, Section 102(a) permits laws or other measures that "modify, limit, or supersede" the rules set out in Section 101, but Section 102(b)(4) renders ineffective a law or other measure that is "inconsistent with the provisions of section 101." Deference to state law in the area of commercial transactions—particularly in the law of contracts—has been the hallmark of the legal system in this country, and we see no reason not to trust the States to adopt uniform rules consistent with the principles promoted internationally by the Administration and set out in H.R. 1714.

We also see no reason for the four-year limit imposed by Section 102 (a)(2) upon the time in which states may adopt laws or regulations to supersede the federal rule, or for limiting (as does Section 102(a)) the ability of states to override the federal rule only in the context of laws "enacted or adopted after the date of enactment of this Act."

In addition, the non-discrimination (with respect to technologies) provisions of Title I of H.R. 1714 as currently drafted place excessive limits on governmental authority. In particular, the specificity of sections 102(b)(1) and (2), concerning nondiscrimination as to both technologies and methods, would appear to preclude any regulation of private parties' authentication or record-keeping practices—even where the transactions involved may be significantly affected with a public interest—as governments now do with respect to paper-based transactions. It is important to ensure the continued ability of governments to engage in limited regulation of some private party transactions in the public interest. For example, state financial regulatory agencies impose limited but important requirements upon financial institutions to ensure the safety and soundness of their transactions. Minimum standards for computer security and interoperability are also sometimes needed, as well as some protective rules involving writings, signatures, and the like—in either a "paper-based" or an electronic context.

We also are concerned about the breadth of the party autonomy provision (Section 101(b)) to the extent it relates to the use of electronic records other than the contract itself. Many regulatory laws and regulations specify the content, format, and method of delivery for notices and disclosures that have been found necessary to avoid unfairness, especially in the context of consumer transactions. We are concerned that this provision, together with the limitations on state regulatory authority just discussed, would significantly impair the ability of the States to protect consumers. Any legislation in this area should not wipe out state consumer protection laws (or allow the drafting of form contracts that circumvent such laws) and should preserve the States' authority to adapt their consumer protection regimes to the electronic environment.

Third, we believe that section 102(c), authorizing the Secretary of Commerce to bring actions to enjoin non-conforming state laws, would be counterproductive. Absent such a provision, section 102 would be self-executing and enforceable in private litigation by parties affected by the non-conforming laws. The mere existence of this injunctive authority, on the other hand, would tend to validate the conformity of any state law against which enforcement action were not taken or were not taken promptly. In addition, to the extent such a provision is included, it should provide that any litigation would be instituted by the Attorney General on behalf of the Secretary of Commerce.

Finally, I want to note that one issue that we raised previously concerning the scope of H.R. 1714 appears to have been addressed by the Committee on Commerce. We were extremely concerned that the bill as introduced overrode federal as well as state law. We note that the reference to federal law in Section 102 has been eliminated. We suggest adding language to Section 101 to make clear that the measure affects only state law standards.

I also would like to outline our views on Title II, which provides for a Department of Commerce study (as well as other actions) concerning the elimination of barriers

to the use of electronic signatures. The thrust of section 201, the study provision, is consistent with the Administration's commitment to ensure the careful review of possible legal and regulatory barriers to electronic commerce. However, we believe that the study required by this section should not be repeated on an annual basis. A biennial update of such a study, if not a periodic update as needed, would be more appropriate given the general speed of legal developments in this area. Also, we note that the Department of Commerce would need to depend in large part upon information provided by the private sector or developed by other agencies and even foreign governments as to regulatory developments within their jurisdiction or particular knowledge.

In summary, we believe that H.R. 1714 contains a number of significant flaws that would have to be addressed before the Administration could support this legislation. We do stand ready, however, to continue to work with the Congress on this important legislation.

Thank you Mr. Chairman. I would now be happy to answer any questions you may have.

Mr. COBLE. Mr. Fong.

STATEMENT OF IVAN K. FONG, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. FONG. Good morning, Mr. Chairman and members of the subcommittee. Thank you for inviting the Department of Justice to state its views on H.R. 1714. I am pleased to have the opportunity today to express the Department's views on the important subject of electronic contracts and electronic signatures.

As Mr. Pincus has noted, this administration has long supported the growth and development of electronic commerce. Since 1997, the Department of Justice has had its own electronic commerce working group, comprised of over 50 attorneys from more than a dozen of the Department's components. Some of this activity is described in greater detail in material available on the Department of Justice's website.

Through this and other working groups, the Department is actively engaged in a variety of electronic commerce policy issues. Just last month the President issued an executive order, Executive Order 13133, that directs the Attorney General to chair an Interagency Working Group on Unlawful Conduct Involving the Use of the Internet. This working group will review certain Internet-related law enforcement issues in the context of the administration's policies of support for industry self-regulation where possible, technology neutral laws and regulations, and, more importantly, an appreciation of the Internet as an important medium, both domestically and internationally, for commerce and free speech.

As the Nation's litigator, legal adviser, and primary law enforcement agency, the Department of Justice strongly supports the administration's efforts to encourage the healthy growth of electronic commerce.

The current bill under review by this subcommittee, H.R. 1714, represents a significant effort to address the legal status of electronic signatures in transactions and contracts. The proposal contains broad provisions regarding the validity of electronic contracts and electronic signatures, including those to which the Federal Government and regulated entities are parties.

The Department supports efforts to ensure that government services are provided in efficient ways that are accessible yet still protect the public. Accordingly, the Department supports the increased use of electronic transactions and electronic-based processes by gov-

ernment agencies. At the same time, we want to be careful to ensure that adequate safeguards exist so the government can retain its ability to enforce its agreements, programs, and laws.

The Department is concerned that H.R. 1714, as reported by the House Committee on Commerce, might limit the government's ability to put in place sufficient safeguards to ensure the effectiveness and enforceability of Federal agreements, programs, and laws. For example, in transactions in which the government or a regulated entity is a party, H.R. 1714 does not address the extent to which the use of electronic processes may affect the availability of records, the usability, persuasiveness, and admissibility in court of information in electronic form, and other legal responsibilities that may arise from the electronic processing of information.

These issues are important, and they are likely to take on heightened significance in view of the fact that the government is all too often a target of fraud, and although we are all familiar with fraud that is committed against government agencies through the use of paper records, agencies must also be able to manage risks arising from the potential for fraud undertaken through the use of electronic records.

In addition, except for title III of the bill, H.R. 1714 does not provide for regulatory needs that relate to agreements made by regulated entities whose own standards may be insufficient to serve the public interest. For example, disclosure or recordkeeping requirements that currently apply to regulated industries or transactions should continue to apply when such transactions are conducted electronically. These concerns, too, must be addressed systematically and deliberately.

Congress last year, with support from the administration, enacted the Government Paperwork Elimination Act to provide an orderly process for increasing the ability of citizens to interact with the Federal Government electronically. To help agencies decide whether electronic processing of information is practicable and how best to achieve it, Congress directed the Office of Management and Budget to develop procedures for the use and acceptance of electronic signatures by executive agencies.

The GPEA links the legal effectiveness of electronic government processes to the procedures used to implement these processes. This linkage is essential to effective adoption of electronic processes by the government.

OMB has been working and continues to work diligently to produce its final procedures. We believe that enactment of H.R. 1714 could disrupt these deliberative efforts undertaken pursuant to congressional directive to allow for the use by Federal agencies of electronic transactions and processes in efficient ways that also protect the public interest.

Thank you, Mr. Chairman, for your leadership, and for the opportunity to present our views on this important topic. I would be pleased to answer any questions you might have.

Mr. COBLE. Thank you, Mr. Fong.

[The prepared statement of Mr. Fong follows:]

PREPARED STATEMENT OF IVAN K. FONG, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Thank you, Mr. Chairman and Members of the Subcommittee, for this opportunity to provide the Department of Justice's views on H.R. 1714, the "Electronic Signatures in Global and National Commerce Act." My name is Ivan Fong. I am a Deputy Associate Attorney General at the Department of Justice. The Office of the Associate Attorney General is responsible for managing and overseeing, among other areas, the Department's civil litigating components, which include the Antitrust, Civil, Civil Rights, Environment and Natural Resources, and Tax Divisions. My particular responsibilities include oversight of civil litigation and environmental matters as well as technology issues, which include Internet and electronic commerce issues. I am pleased to have this opportunity today to express the Department's views.

This Administration has long supported the growth and development of electronic commerce. In its *Framework for Global Electronic Commerce* in July 1997, the Administration declared its support for electronic commerce generally and, in particular, for the development of a legal framework that "recognizes, facilitates, and enforces electronic transactions worldwide." An interagency Working Group on Electronic Commerce, of which the Department of Justice is an active member, meets regularly to discuss and address electronic commerce policy issues. And, since 1997, the Department of Justice has had its own Electronic Commerce Working Group, comprised of over fifty attorneys from more than a dozen of the Department's components. (For more information on electronic commerce activity at the Department, please see the Department's website, at www.usdoj.gov/criminal/cybercrime/ecommerce.html.)

Through these working groups, the Department is actively engaged on a variety of electronic commerce policy issues. For example, earlier this year, the Department participated in the Federal Trade Commission's workshop on Consumer Protection in the Global Electronic Marketplace. Department officials have also testified before Congress on issues relating to Y2K liability, Internet gambling, and the sale of prescription drugs over the Internet. In addition, just last month, the President issued an Executive Order (E.O. 13,133) that directs the Attorney General to chair an interagency Working Group on Unlawful Conduct Involving the Use of the Internet. This Working Group will review certain Internet-related law enforcement issues in the context of the Administration's policies of support for industry self-regulation where possible, technology-neutral laws and regulations, and an appreciation of the Internet as an important medium both domestically and internationally for commerce and free speech. As the Nation's litigator, legal advisor, and primary law enforcement agency, the Department of Justice strongly supports the Administration's efforts to encourage the healthy growth of electronic commerce.

The current bill under review by this Subcommittee, H.R. 1714, represents a significant effort to address the legal status of electronic signatures in transactions and contracts. The proposal contains broad provisions regarding the validity of electronic contracts and electronic signatures, including contracts and agreements to which the federal government and regulated entities are parties.

The Department of Justice, of course, strongly supports all efforts to ensure that government services are provided in efficient ways that are accessible to, yet still protect, the public. Accordingly, the Department supports the increased use of electronic transactions and electronic-based processes by government agencies. At the same time, however, we want to be careful to ensure that adequate safeguards exist so that the government can retain its ability to enforce its agreements, programs, and laws.

The Department is concerned that H.R. 1714, as reported by the House Commerce Committee, might limit the government's ability to put in place sufficient safeguards to ensure the effectiveness and enforceability of federal agreements, programs, and laws. For example, in transactions in which the government or a regulated entity is a party, H.R. 1714 does not address the extent to which the use of electronic processes may affect the availability of records; the usability, persuasiveness, and admissibility in court of information in electronic form; and other legal responsibilities that may arise from the electronic processing of information (such as those imposed by the Privacy Act, the Freedom of Information Act, and the Federal Records Act). These issues are important, because they affect the government's ability to enforce its agreements and programs and to defend itself from potential lawsuits. These issues are likely to take on heightened significance in view of the fact that the government is all too often a target of fraud, and although we are all familiar with fraud that is committed against government agencies through the use of paper records, agencies must also be able to manage risks arising from the potential for fraud undertaken through the use of electronic records.

In addition, except for Title III of the bill, which authorizes the Securities and Exchange Commission to provide standards for electronic contracting under federal securities laws, the bill does not provide for regulatory needs that relate to agreements made by regulated entities, whose own standards may be insufficient to serve the public interest. For example, disclosure or record keeping requirements that currently apply to regulated entities or transactions should continue to apply when such transactions are conducted electronically. These concerns, too, must be addressed systematically and deliberately.

Indeed, Congress last year, with support from the Administration, enacted the Government Paperwork Elimination Act ("GPEA"), title XVII of Pub. L. 105–277, to provide an orderly process for increasing the ability of citizens to interact with the federal government electronically. Under the GPEA, executive agencies must, by October 2003, provide for the option of electronic submission and processing of information, when practicable as a substitute for paper, and for the use and acceptance of electronic signatures, when practicable (GPEA § 1704). To help agencies decide whether electronic processing of information is practicable, and how best to achieve it, Congress directed the Office of Management and Budget ("OMB") to develop procedures for the use and acceptance of electronic signatures by executive agencies (GPEA § 1703). Congress further provided that electronic records would "not be denied legal effect" if they were submitted or maintained in accordance with the OMB procedures (GPEA § 1707). The GPEA thus links the legal effectiveness of electronic government processes to the procedures used to implement these processes. This linkage is essential to effective adoption of electronic processes by the government.

OMB has been working and continues to work diligently to produce its final procedures by April 2000. Earlier this year, OMB published a proposed draft of its procedures (64 Fed. Reg. 10,896 (Mar. 5, 1999)). The Department of Justice submitted written comments to OMB on the proposed draft procedures, describing in substantially greater detail some of the themes mentioned above. (The Department's comments on OMB's proposed procedures under the GPEA are available at www.usdoj.gov/criminal/cybercrime/gpea.htm.)

In short, OMB is already working with many federal agencies, including the Department of Justice, to define a set of procedures that address issues, including those identified above, that arise from federal agency use of electronic transactions and processes. We believe that enactment of H.R. 1714 as reported could disrupt those deliberative efforts, undertaken pursuant to Congressional directive under the GPEA, to allow for the use by federal agencies of electronic transactions and processes in efficient ways that also protect the public interest.

Even if H.R. 1714 were amended to apply only to transactions between private parties, we would remain concerned, because it would still cover transactions in which the federal government succeeds to the position of one of private parties who entered into the contract. For example, the federal government may in some instances find it necessary to enforce contracts made by private lenders to whom the government provides loan guarantees. Similarly, in legal actions against businesses related to reporting or business records, the government's evidence may depend on the terms and conditions established by the private parties to the transaction.

Thank you for the opportunity to present the views of the Department on H.R. 1714 and this important topic. We look forward to working with this Subcommittee or Committee in any way that you would find helpful. I would be pleased to answer any questions you might have.

Mr. COBLE. Thank you both for appearing before our subcommittee.

Mr. Pincus, in your statement you argue that if H.R. 1714 is enacted, it could force the government to transact business and accept records by any means and according to any standards, which could pose a security threat to government systems. I am not quarrelling with that, but give us an example.

Mr. PINCUS. One of the concerns is that the bill has a technology neutrality requirement, which we agree with with respect to government regulation of private transactions, because there are a lot of different ways to sign electronically, anything from just sending an e-mail with your name typed at the bottom to the most sophisticated and secure cryptography.

We wouldn't want to have a situation where, for example, government agencies, because of the requirement that there be no dis-

crimination, were required to accept just an e-mail signed with someone's name at the bottom as a way to authorize a change in Social Security benefits or for the filing of a tax return, since we clearly want to know that the person filed it in order to hold them to the things that are in that form or that tax return.

So the concern is that when the government itself is a party to the transaction, just like any other party, it should be entitled to determine the level of security and trust that it needs for that transaction and to implement that. We are afraid that the nondiscrimination provision denies that to governments at all levels.

Mr. COBLE. Does S. 761, in your opinion, have similar problems?

Mr. PINCUS. S. 761 excludes government transactions, so it does not have that problem, because government transactions are carved out.

Mr. COBLE. Mr. Fong, section 102(C) of H.R. 1714 appears to have assigned to the Secretary of Commerce the duty of bringing an action to enjoin the enforcement of a State law that the Secretary of Commerce believes is inconsistent with section 101. What is the Justice Department's interpretation of this provision of H.R. 1714?

Mr. FONG. This type of language, which appears in several other statutes, is interpreted to mean that the actual injunctive action would, in fact, be brought by the Department of Justice as the Commerce Department's lawyers, working, of course, very closely with Commerce. That is, the language that is in section 102(C) does not confer independent litigating authority on the Department of Commerce. That is how both we and the Commerce Department agree that this language should be interpreted.

Mr. COBLE. Let me try to get one more question in. See, the red light applies to us, too, Mr. Pincus.

In your testimony, and this may be an extension of the question I put to Mr. Fong, in your testimony, Mr. Pincus, you stated that, instead of the Secretary of Commerce, that the Department of Justice would be the appropriate agency to bring an action for injunction against such statute that is not in compliance with H.R. 1714 once it is enacted. Tell us why you prefer the Department of Justice; and, also, do you have any concerns with the actions to enjoin section of H.R. 1714, regardless of who has the authority?

Mr. PINCUS. Let me answer that question first, if I might, Mr. Chairman.

Our concern is with having that section at all, frankly. We don't have the resources in the Department to conduct our own examination of State statute books to figure out where there are problematic laws. The States themselves actually are going through that process as they enact UETA. That seems appropriate. We don't have the resources, so it would be extremely difficult for us, on our own, to conduct that examination.

Clearly, people could come to us, bring things to the Department's attention, and then the Department could evaluate whether to move forward. Our concern is that, because that provision is there, parties to a transaction and perhaps even courts might give significance to whether or not the Secretary, through the Attorney General, had brought such an action.

We think that, because the odds are that we won't be doing a lot of that for the reasons I just mentioned, this provison might prevent the appropriate adjudication of these issues.

Really, as with many other statutes that preempt State law with respect to dealings between private parties, we think the appropriate way for this to proceed is for there to be a rule, a Federal rule, and then leave it to the parties to the transaction and to the dispute to invoke that rule and to litigate its applicability when it arises.

Clearly, the government would have the ability to intervene to file an amicus brief if there was some important government interest involved, but, as a routine matter, we are afraid the provision will create an expectation that cannot be met and therefore affect the interpretation of the statute.

Mr. COBLE. One quick question.

Mr. Fong, do you embrace that theory?

Mr. FONG. Yes.

Mr. COBLE. I figured you would.

The gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman.

My education on this subject started after I finished speaking, or, actually, while I was speaking it started and continues from now at least until the time of the markup, so I want to just go back to make sure I understand some basics here.

Somewhere, those people who do those uniform codes got together with the participation of what? The Commerce Department and the Justice Department? The Commerce Department? Any Federal presence?

Mr. PINCUS. We were involved in the process mostly as observers but with a large amount of input from all facets of the private sector.

Mr. BERMAN. Those people put together a Uniform Electronic Transactions Act, and now it is out to all the States. The States are starting to adopt that act?

Mr. PINCUS. Yes.

Mr. BERMAN. How widely or how wide-ranging has been the adoptions?

Mr. PINCUS. So far, your State is the leader. California has acted. I think there is a witness on the next panel from NCCUSL who can probably give you more details. My understanding is that it was finalized at the end of July. My understanding is that it will be in 20——

Mr. BERMAN. California has already adopted it?

Mr. PINCUS. Yes. My understanding is a number of State legislatures are going to have it put before them this year. Whether they will get to final action, I don't know. But I think that action will be prompt on the scale of the speed with which these things are done. I think the NCCUSL people realize the importance of moving quickly, and they have made it a priority for the people in the States to try and get action soon.

Mr. BERMAN. As an observer of this process, what was your conclusion about what they came to, what they put together?

Mr. PINCUS. We think that they come up with a very good product; that it enables—it is technology neutral. It does not direct the

market, but it provides a legal framework for the market to move forward.

Mr. BERMAN. How did they deal with the government contracts issue?

Mr. PINCUS. They have special provisions. The bill has more than 20 sections—or about 20 sections. There is a special section applicable to government. They separate regulation of private transactions from regulation of the government. That happened in the uniform law process in California; they made that kind of separation. The uniform law provides a structure, but it provides that the States can carve out certain things.

Mr. BERMAN. Choose this, choose that?

Mr. PINCUS. And maybe leave certain regulatory provisions in place. I have not seen it, but I understand the California law identifies some close to 100 laws that are not to be affected, with the idea that they involve specific regulatory requirements applicable to transactions in the physical world and that there has been a directive to the California law revision authorities to look at those statutes and come up with electronic analogs for them so they can then be considered by the legislature.

Mr. BERMAN. The bill in front of us in effect preempts this uniform code?

Mr. PINCUS. Well, it allows the States to adopt it, but the concern is that it has some continuing restrictions on State authority. What is very unclear is, if a State chooses to make exemptions or accommodations to fulfill other public policy, regulatory, or consumer protection goals, how the continuing Federal preemption in this bill will interrelate with those State choices. It creates a lot of uncertainty.

We think the risk is that, even after California has enacted UETA, the continuing preemption under this bill might prevent California from making those adjustments that I talked about in terms of translating regulatory consumer protection requirements into the electronic world or might limit California's options in doing that. We don't think that is appropriate.

Mr. BERMAN. Does the House bill that is in front of us, how does it deal with, say, something like the IRS regulations on electronic filing of tax returns? Does it defer to those regulations, or does it supersede them in any fashion?

Mr. PINCUS. Well, the bill has moved an important step forward since it was reported by the Committee on Commerce, because now restrictions on Federal regulatory authority have been removed, although we think it could be a little clearer, so it appears to allow the Federal Government to supersede these rules if it reenacts its own regulations.

But the problem is that although the reference to Federal regulations as being subject to the same standards as those of the States has been removed, transactions in which the Federal Government is involved as a party are still included. So the bill is a little ambiguous in this area. And, of course, the types of concerns that we have with respect to the IRS rules, the States also have with respect to their tax filings and all kinds of transactions. Those clearly are covered.

Mr. BERMAN. You want to preserve the right of the government to enter into or to try and get people to enter into adhesion contracts with the government?

Mr. PINCUS. That is right. Well, we have some constraints on our ability to impose terms, such as the legislative process, that might not be true of private parties.

Mr. COBLE. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Mr. Chairman, I guess my problem is in this area of the continuing preemption.

Since I have served on this committee, which is a little over 2 years, we are dealing with the issue of class actions, which diminishes the State role. We are dealing with proposals relative to property rights, which diminishes the State role. We are continuing to federalize State criminal law. We are diminishing the State role in terms of product liability issues. The direction we are heading in, we might as well just eliminate State courts. I think I understand, too, that this is the era of e-commerce

In fact, there was a recent opinion piece that ended up on my desk from some group that did a study which showed that the States at some point in time, and I don't even know if it is 5 or 10 years out, could very well lose some $15 billion in terms of State revenues because of e-commerce.

I know it is wonderful to have uniformity, and it very well could be necessary, because I think everyone here wants to nurture e-commerce. I think the three of us here on the panel supported the moratorium on new taxes relative to the Internet. But I am just uneasy with this concept.

We hear from representatives of the Administration saying it is unclear as to the relationship between the, I think in your words, Mr. Pincus, the continuing preemption, even if a State should sign on to the new uniform act.

Any comments on what I am saying?

Mr. PINCUS. We agree with you, certainly on a number, if not all, of the issues that the gentleman has mentioned. The Administration has expressed the same concerns.

I think here, especially where the States have put in a lot of time, as Congressman Berman mentioned, 2 years studying this matter, and have come up with a product that deals with a lot of the details, and the details are important in issues like this, we think that that product deserves respect, especially because it comes in a context where the States have been able to develop a uniform commercial law that has facilitated interstate commercial dealings in the country for 50 years. That is what surprises me.

Mr. DELAHUNT. Because the States have shown responsibility in terms of commercial and contractual relationships. Maybe the second panel can address this question, but let me pose it.

Can you define the need, or is this a serious problem now in the marketplace? I don't know, maybe you can grade it on a scale of 1 to 10, but in your judgments, when would you expect that there would be a critical mass of States adopting the uniform code, which could compel all 50 States to sign on?

Mr. PINCUS. Well, we started the process of the Administration's consideration of this legislation earlier this year with the view that

really there was no need, that we had not seen the need for even an interim measure.

Through the interactional legislative process, we came to the conclusion that we could support something if it was clearly an interim measure and as long as it did not do any harm during that interim period, including no harm by disrupting consumer protections, regulatory requirements and things like that.

So clearly e-commerce is growing, if we look at the numbers. I think it is probably just as clear that there are lawyers worrying, as lawyers always do, about whether things are enforceable or not. To the extent some interim clarity can be provided without sacrificing these other goals, we are supportive of that. But that is why we think it has to be very targeted, very interim, and designed to just deal with the focal question of contract formation, which is where I think there can be some very minimal, clear rules.

But when we get into these other areas about notices and disclosures, because they are regulatory requirements, it becomes much more complicated.

Mr. DELAHUNT. Mr. Chairman, just one more question. I will repeat the question, the last question that I asked. Because you were observers during the course of the discussions among the Uniform Code Commissioners, do you have any sense as to the speed with which the States will respond?

You indicated California. California is obviously a significant State. I understand, obviously, that the State legislature, for a variety of different reasons—they have Mr. Berman, of course, representing them here, and that is of great consequence——

Mr. BERMAN. That is why they want to preserve State options.

Mr. DELAHUNT. But in terms of the receptivity of the States, do you expect it will happen quickly?

Mr. PINCUS. Well, I think it will for two reasons.

First of all, I think NCCUSL, the State representatives to the uniform law conference, are aware that this decision is before Congress, and that in itself is prodding the States to move forward more quickly because they would obviously like to be the masters of their destiny. So I think that that has prodded the State representatives to give this issue more visibility, more prominence, and to push it more quickly within their States.

I also think that there is an interest, as there is in Congress and as we see in countries or in governments around the world, in doing whatever governments can do to facilitate this new economy.

And I think that among uniform laws—and I don't want to malign any particular legal area by thinking of one that might not be as topical—this is clearly a topical area. So it seems to me for that reason, in addition, that URTA will get more attention than the run-of-the-mill uniform law might get.

Mr. COBLE. Mr. Berman, any additional questions?

Mr. BERMAN. One more question—or one short question and one longer question. The short question, the Senate bill, what do you guys think about that?

Mr. PINCUS. The Administration supported the bill that came out of the Senate Committee on Commerce. Some concerns were raised about the scope of that bill, especially with respect to consumer

protections. There have been a number of discussions ongoing about that.

Senator Abraham said on Tuesday that there was going to be a substitute amendment jointly offered on the Senate floor by him and Senator Leahy, which I think will address those concerns. But they have not gotten the bill brought up yet on the Senate floor.

Mr. BERMAN. Under State law there are all kinds of issues involving how to authenticate contracts in the context of litigation. Just tell me, how do either the uniform code or this bill—how do they deal with authentication issues for purposes of enforceability? What is the structure for that?

Mr. FONG. The UETA is meant to be merely a procedural, rather than substantive, set of rules that would guide the kinds of issues that you discuss. It has a nondiscrimination principle that merely provides that, if the record is in electronic form, it may not be excluded simply because it is in electronic form.

More importantly, the reporters' note to this section, which is 112, provides that, "Nothing in this section relieves a party from establishing the necessary foundation for the admission of an electronic record." .

Mr. BERMAN. What was that——

Mr. FONG. Nothing would relieve a party from establishing a necessary foundation.

The general rule is, of course, that the proponent of a piece of evidence must lay the foundation; and, in that sense, we think UETA would not change those general rules that apply, whether they are in State court or in Federal court.

Mr. BERMAN. How about this bill, the House bill?

Mr. FONG. This bill does not contain——

Mr. BERMAN. Does not address the issue?

Mr. FONG. Right. We think for that reason it creates uncertainty on this issue.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman from California.

We have been joined by the gentleman from Wisconsin and the gentleman from Virginia. Do either of you have questions?

Mr. SENSENBRENNER. No questions, Mr. Chairman.

Mr. GOODLATTE. No questions.

Mr. COBLE. Good to have you with us.

Mr. Pincus and Mr. Fong, thank you for joining us. I think that you are closer to this than I, but I think the administration has come down in favor of the Senate bill, so if you all can get the administrative oars in the water, we might move along, because I think this is critical to the well-being of our economy.

I appreciate you all being here. Thank you.

Mr. FONG. Thank you, Mr. Chairman.

Mr. PINCUS. Thank you.

Mr. COBLE. We will now call forward the second panel.

The first witness on our second panel will be the Honorable Pamela Meade Sargent, the U.S. Magistrate Judge of the Western District of Virginia, and may well be your constituent, Mr. Goodlatte.

Judge Sargent received her J.D. From the University of South Carolina School of Law and her BA in communication studies from

the Virginia Polytechnic Institute and State University and is a magna cum laude graduate.

I did not know that you where from Mr. Goodlatte's district or I would have let him introduce you, Ms. Sargent.

Ms. SARGENT. Actually, Mr. Chairman, I belong to Mr. Boucher, who is not here. I am from Abingdon. I will claim Mr. Goodlatte, but I belong to Mr. Boucher.

Mr. COBLE. Our next witness is Scott Cooper, the Manager of Technology Policy at Hewlett-Packard Company. Mr. Cooper is responsible for global electronic commerce, Internet, and advanced network services issues for Hewlett-Packard. He has worked closely on United States legislation dealing with electronic signatures and authentication. Prior to working for Hewlett-Packard, Mr. Cooper was director for electronic commerce at the American Electronic Association.

Our next witness is Mr. David Peyton, who has been Director of Technology Policy at the National Association of Manufacturers since May 1996. He began his career at the National Commission on New Technological Uses of Copyrighted Works in 1996. Mr. Peyton holds a bachelor's degree in government and foreign affairs, Phi Beta Kappa from the University of Virginia, and a masters in political policy from the University of California at Berkley.

We may have to keep the VPI and the University of Virginia separated. I am glad there is someone between you two and therefore no scuffle will be forthcoming.

Our final witness on this panel is Margo Freeman Saunders, who has been the Managing Attorney of the Washington office of the National Consumer Law Center. Ms. Saunders' duties include representing low-income clients in Congress on financial credit issues and analysis of water and energy issues as they affect low-income people.

Prior to coming to Washington in September 1991, she was the consumer specialist for the North Carolina Legal Services. Ms. Saunders holds an undergraduate degree from Brandeis University and is a graduate of the University of North Carolina School of Law.

You and I share a mutual alma mater, the school of law, Ms. Saunders. Good to have you.

We have written statements from each of you. It is good to have you with us. I would remind you all again of the ever-present red light. When you see it illuminated, that is your signal to wrap it up.

Now, we have a vote on, I am told by the bells. It appears there are two votes, probably one 15- and one 5-minute vote. If you all will rest easy, we will be back imminently.

[Recess.]

Mr. COBLE. Folks, I apologize for the delay, but the votes did come without notice, so we had to respond to that.

I want to apologize, as well, to the panel. Oftentimes we are required to be at four or five places simultaneous, as I am sure you all are required to do in your respective jobs. Today is one of them days, as we say in the rural South.

I am going to have to depart before you all conclude. Do not take my departure as an indication of lack of interest. I assure you that

is not the case. I think Mr. Goodlatte will relieve me when my time comes.

Mr. COBLE. We will commence; and, Ms. Sargent, why don't you begin? We will follow right on down the line.

STATEMENT OF PAMELA MEADE SARGENT, U.S. MAGISTRATE JUDGE, WESTERN DISTRICT OF VIRGINIA

Ms. SARGENT. Thank you, Mr. Chairman.

I am here on behalf of the National Conference of Commissioners on Uniform State Laws. This is the group that has promulgated the Uniform Electronic Transactions Act. I am one of "those guys" that have done this act. In fact, I was a member of the drafting committee which actually drafted the Uniform Electronic Transactions Act over the course of the last couple of years. So I appreciate the opportunity on behalf of NCCUSL to be here and to share our views on this House resolution.

I want to convey our conference's appreciation for the position that has been given to our uniform act, the UETA, in this bill. I want to say right up front that the conference, the Uniform Law Commissioners, supports the overall goal of this act. That is to promote a predictable, minimalistic legal environment for electronic commerce.

However, I also need to state right up front that the conference strongly believes that the best way to accomplish this goal is by adoption of uniform State legislation, that being namely the UETA, rather than by Federal legislation which could possibly preempt State commercial law. That is one of our biggest concerns. I want to focus on that today in a moment.

I want to get away from my prepared remarks only because I want to answer some of the very specific questions that have been raised today and have been raised to some of the other gentlemen, and I think perhaps I am a little bit better prepared on behalf of the conference to answer these questions about the UETA.

The UETA project began more than 2 years ago. Of course, the conference itself is comprised of representatives from 53 jurisdictions. All of the States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have representatives in the conference.

The drafting committee had a total of seven public meetings. These were not 1-hour meetings. These were 3-day meetings, 8-hour days. In attendance at those meetings were numerous representatives, attorneys, law professors, public officials, business representatives, and representatives from various local, State, and Federal agencies and governments.

I do want to express here at this point that there were many, many Federal agencies who participated in our process. In particular, just off the top of my head, I can recall today that there were representatives of the IRS on occasion, the Federal Reserve, Freddie Mac, Fannie Mae, Commerce, and there were many other representatives of other departments and agencies who were present.

These committee meetings were attended by numerous observers. I use the word "observers" because that is how they are referred to, but that really is not a good description. Everyone who attended these meetings, every person was actively involved in the drafting

of this act. When we have observers, they are not placed in the gallery. They are brought up to the table. They have the floor. They are able to talk and comment about the act and share their comments with the drafting committee.

I tell you this because I want to emphasize that the UETA that was adopted this July by the conference and is now ready to be introduced in all of the States, it really is a product of very wide consensus. It is an enabling bill, it is not intended to be a regulatory bill, and I want to state that right up front. It is an enabling bill which was designed to remove the unintended impediments to electronic commerce and transactions without in any way overriding the established law which governs the substance of those transactions.

We believe we have a good product. It is well-reasoned, it is well-drafted, and it is out there. It has been adopted by the conference. It has been introduced and has been adopted by the California legislature. It has been enacted into law.

To answer the specific questions about how fast a track it is on, we anticipate that in this legislative session—and by "this legislative session" I mean not just 1999, because many of the State legislatures do not meet again until after the turn of the year—but in this new legislative session, that 27 jurisdictions, the act will be introduced in 27 separate jurisdictions. In many of them, such as Virginia, Utah, Massachusetts, Pennsylvania, Kentucky, we are very hopeful that it will be adopted and enacted.

Mr. COBLE. Thank you, Judge Sargent.

[The Prepared Statement of Judge Sargent follows:]

PREPARED STATEMENT OF PAMELA MEADE SARGENT, U.S. MAGISTRATE JUDGE, WESTERN DISTRICT OF VIRGINIA

I appreciate the opportunity to provide the House Committee on the Judiciary Subcommittee on Courts and Intellectual Property with the views of the National Conference of Commissioners on Uniform State Laws regarding H.R. 1714. The Conference supports the overall goals of this legislation of promoting a predictable, minimalist legal environment for electronic commerce. However, we strongly believe this goal will best be served by the prompt adoption of uniform state legislation—namely the Uniform Electronic Transactions Act or "UETA."

We must of course appreciate the position that UETA has been given in H.R. 1714. And the criticism of provisions in H.R. 1714 should not be taken as criticism of the good will and good faith of the drafters of H.R. 1714. Even with the deference to UETA shown in H.R. 1714, its provisions are predictably so troublesome, we feel compelled to comment on the problems we see in these provisions. But, first I would like to give some background on UETA.

UETA represents the measured, careful development of appropriate law that the NCCUSL has traditionally provided to the state legislatures, a statute that beneficially adapts the law to changed commercial circumstances, but avoids disruption of business, unneeded litigation and other unfortunate, unintended consequences.

The UETA project began a little over two years ago with a study by the National Conference of Commissioners on Uniform State Laws. Efforts were already underway to make the Uniform Commercial Code electronically friendly. That study indicated that comparable efforts in other state law areas to those accomplished or under way in the Uniform Commercial Code to remove barriers to e-commerce were desirable. The study also indicated possible initiatives at the federal level, but emphasized the desirability of a state law initiative which could be expected to meld more smoothly with the state laws upon which it would impact, and would avoid disruption while encouraging e-commerce. A federal statute, which would rely upon the all or nothing approach of preemption to impose rules of law on the states, risks disrupting existing commerce, including commerce that is already conducted in electronic form. There are sad examples of this problem existing in federal legislation

on consumer credit and secured transactions in farm products. Based on these considerations, the NCCUSL went forward with the drafting project.

The drafting committee created in response to the study began work and in the two years spent on the draft established a wide consensus on what is necessary to remove unintended impediments but at the same time not to override laws that establish necessary requirements not appropriately met in e-commerce. The drafting committee concluded its work with approval of UETA at the NCCUSL conference in July. Thus, UETA bills are currently being prepared for widespread adoption in the state legislatures next year.

UETA is designed to accomplish the following goals

- Remove writing requirements which create barriers to electronic transactions.
- Remove signature requirements which create barriers to electronic transactions.
- Insure that contracts and transactions are not denied enforcement because electronic media are used.
- Avoid having the selection of medium (paper v. electronic) govern the outcome of any dispute or disagreement.
- Assure that parties have the freedom to select the media for their transactions by agreement.
- Provide for the enforceability of transactions conducted via electronic agents.
- Furnish appropriate standards for the use of electronic media to give notices.
- Authorize state governmental entities to create, communicate, receive, and store records in electronic records.
- Encourage state governmental entities to move to electronic media in a manner which maximizes interoperability and compatibility of systems.

Fundamental principles which have governed all choices in the drafting are 1) to encourage and maximize the freedom of markets to achieve efficient and fair market solutions and 2) the freedom of both technology and markets to continue to evolve and develop. One guiding principle is that all solutions must be technology neutral and business model neutral. A second guiding principle is to do only what is essential to create a framework for electronic commerce, neither displacing the substantive law of the jurisdictions applicable to transactions nor creating a new regulatory regime.

UETA is designed to interact with existing state law, assuring that the results and consequences of transactions do not vary on the basis solely of the media selected by the parties for conducting and recording their transactions. UETA provides, among other things, that electronic records, transactions and contracts are as effective and enforceable as if done on paper, that electronic signatures are effective and enforceable, that they are as admissible into evidence as their paper counterparts, that the parties are free to agree between themselves to use, or not to use, specific media including paper or electronic technologies. State law has, throughout the history of this Nation, been a source for most contract, property and other civil, private law. UETA is designed to leave the familiar rules intact and in place, simply assuring that they present no barriers or hindrance to electronic commerce.

The National Conference of Commissioners on Uniform State Laws has been very involved in commenting on the electronic commerce bills in Congress this year. The following comments are offered as an effort to reconcile state and federal efforts inso-far-as that is possible. They address Title I of HB 1714. The other titles are outside the scope of NCCUSL interest. I will also address to some extent S.B. 761- the Millennium Digital Commerce Act. The following comments should not be interpreted as an endorsement of any federal legislation.

In addressing HB 1714 today, I will focus on two issues of concern and highlight additional problems with the bill. The first issue has to do with the enforcement powers given to the Department of Commerce. The second issue has to do with federal preemption. Finally, I will address the states efforts to adopt UETA on a uniform national basis.

ENFORCEMENT POWERS IN H.R. 1714

H.R. 1714 gives the Secretary of Commerce equity powers against the states in Section 102(c): "the Secretary may bring an action to enjoin the enforcement." That power reinforces the prohibitions of Section 102(b) and would leave the Secretary in the unenviable position of trying to interpret that section (discussion of Section 102(b) to follow). Because technology specificity is the labeled evil in Section 102(b), not only is the Secretary pitted against the states, the power seems very likely to

be exercisable against one part of the computer information industry on behalf of another segment. There are, therefore, ominous and unfortunate implications of anti-trust in Section 102(c). The lack of standards for exercise of the power is likely to mean misuse. Misuse may be the only use, in fact. There is no indication that the Secretary of Commerce wants this power, and it is to the credit of the current Secretary that the Department does not want it. The "Actions to Enjoin" section of H.R. 1714 raise so many questions about the effect and constitutionality of Section 102(c), that we strongly recommend that it be stricken from the bill.

There are also very practical implementation problems. Section 102(b) does not address important issues of court jurisdiction, choice of law, or representation of the Commerce Department. The Commerce Department may have the power, but would have no clear means for the exercise of it.

PREEMPTION

H.R. 1714's preemption language is very difficult to interpret. Unlike S.B. 761, it assumes the hegemony of the rules in Section 101 and then permits some latitude for a state law to "modify, limit, or supersede the provisions of section 101." Under Section 102(a)(1)(B), UETA is an acceptable modification, limitation or supersession of Section 101, in toto. UETA does not appear to be subject to the restrictions that apply to other state law under Section 102(a)(1)(B). Other state law may specify "alternative procedures or requirements for the use or acceptance of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or agreements." This is the only substantive scope of permissible state law other than UETA. In addition, any state law that impacts the rule in Section 101, must be adopted within two years after the enactment of the federal rule and must make specific reference to Section 101.

Without reference to the rest of Section 102, a court would always begin with the federal rule. State law would apply within the limited scope prescribed in Section 102(a). Only UETA, as adopted in state law, would stand alone as the source of law pertaining to electronic records and signatures. Without anything else, these provisions are a hybrid of field and subject preemption. For that reason, they lend themselves to no predictable interpretation.

One could make a serious argument that Section 102(a) encourages nonuniformity rather than uniformity. In a sense, it gives the states an incentive to consider variations in order to meet the two year rule. The federal rule may be thought of as a baseline against which the states are invited to enact variation. It is likely that the invitation will be accepted. Section 102(a), however, may not be considered by itself, alone.

Section 102(b) of H.R. 1714 adds whole new universes of complication. This provision prohibits state law that "discriminates in favor of or against a specific technology, method, or technique of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures, or, "discriminates in favor of or against a specific type or size of entity engaged in the business of facilitating the use of electronic records or electronic signatures." Section 102(b) goes beyond preemption in any recognized sense. This section intends regulation of future state law-making over the foreseeable long-term, and would put that law-making firmly under exclusive federal control. It is a direct attack on state sovereignty.

Discrimination in this context is a serious wild card. How do these provisions affect state procurement, for example? Or law governing contracts with service providers to a state? What about provisions in state law governing such matters as disclosure of contract terms in specific contexts? Is there not conflict between Section 102(b)(1), which prohibits discrimination against technology, methods and techniques and Section 101(a)(1)(B)(1), which suggests that state law may specify "alternative procedures or requirements for the use or acceptance of electronic records or electronic signatures?"

UETA is so specifically technologically neutral, that it is hard to propose a conflict between it and Section 102(b)(1). But that may not be true for the Uniform Computer Information Transactions Act and other state law pertaining to the use of electronic records and signatures. If a statute specifies standards for authentication, is that discrimination against technologies that do not meet the particular standard for authentication? Would any existing digital signature statute, no matter how discretionary, survive the test of section 102(b)(1)? These provisions are a new and dangerous adventure in federal-state relations that may be well beyond the bounds of the express powers of Congress. It is one thing to pose a rule that preempts a comparable state rule, when Congress has concurrent legislative power. It is another thing for Congress to dictate the state law-making process in making rules of law.

There is more to Section 102 of H.R. 1714, however. Section 102(b)(3) prohibits state law modifying, limiting or superseding Section 101 that "is based on procedures or requirements that are not specific and or that are not publicly available." Section 102(b)(4) prohibits state law that is "otherwise inconsistent with the provisions of section 101." Section 102(b)(3) opposes general, secret procedures or requirements. It is not easy to determine what those are. Section 102(b)(4) would seem to make all the rest of Section 102 irrelevant and to align H.R. 1714 with S.B. 761. Section 102(b)(4) is a rough statement of standard subject matter preemption: How this is to be interpreted in light of the rest of Section 102 is an unanswerable question.

What arises from Section 102(a) and (b), therefore, is large-scale ambiguity, conflict and threat to state sovereignty. Its impact on both state and federal law is not in any sense predictable. One of the serious impacts is the ability of state law to react to technological change. One possible impact of Section 102 would appear to be to freeze the law in time and place to now. There must be flexibility to respond to the technological change that we know is coming. It is absurd to hold the future hostage to an inchoate, ill-formed principle of technological neutrality.

Another ominous unpredictable impact is upon federal courts. Since federal law controls under H.R. 1714 under its preemption principles, it is potentially possible that every contract case involving a question of the validity and legal effect of an electronic signature and record inherently contains a federal question. If so, that would potentially invoke federal jurisdiction in numbers of cases in which federal jurisdiction is not now a question. It is impossible to predict the impact of this shift on federal courts. There is not only a serious question of court dockets as the numbers of contracts in e-commerce increases, perhaps exponentially, but a serious question of fundamental jurisprudence. Will federal courts become the customary place of adjudication for contracts, and what impact will that have on the law of contracts, in general? H.R. 1714 provides no answer to these serious questions.

S.B. 761

Let me reiterate one point, as I move to the consideration of S.B. 761. The NCCUSL does not support federal legislation that preempts state law. Having said that, it is the NCCUSL's position that S.B. 761 does the least damage to state interests of the two bills before the Judiciary Committees. It does not attempt to regulate the issue of technological neutrality to the extreme extent H.R. 1714 does. Its preemption provision is within the recognized bounds of standard preemption doctrine. S.B. 761 shares a serious weakness with H.R. 1714. Neither bill exempts negotiable instruments and documents. That may have serious unintended consequences. Even so, S.B. 761 remains preferable. We think it will be mooted by the completion of UETA adoption in the state legislatures in a short period of time. Given the availability of UETA, it is a bill within which the states can reluctantly live.

UETA PROJECTION IN THE STATES

One of the issues before this subcommittee is the time during which the states will consider and enact UETA. Please note California has adopted UETA. The California legislature held the bill up only for the purposes of waiting for the NCCUSL to complete its deliberation in July. Once UETA was promulgated, California swiftly acted, and UETA is now law in California.

As this hearing is taking place, a hearing is also taking place in Pennsylvania. An introduction is anticipated in Massachusetts before the end of the calendar year. An interim hearing with UETA as a topic has already been held in Virginia in anticipation of early introduction in 2000. I report these actions in four major commercial states to suggest that the states will move to adopt UETA with urgency. A survey of legislative plans for the year 2000 taken from the Uniform Law Commissioners during their Annual Meeting in July suggests that at least twenty-seven states will see introduction of UETA in 2000.

The Legislative Director of the NCCUSL estimates major consideration of UETA in a majority of states in 2000, with legislative activity almost certainly wrapped up in 2001. The symbol of the year 2000 looms very large in the development of UETA. How better to prepare for the millennium? However, 2000 is the short legislative year in the majority of states, though not in my home state-Virginia. Some states have no 2000 session, at all. Whether the millennium begins in 2000 or 2001 as some assert, we strongly believe that it will begin with UETA as the effective law of the land. We of the NCCUSL think it is the best start for the new millennium that we can give to our country.

CONCLUSION

On behalf of the National Conference of Commissioners on Uniform State Laws, I would like to thank the Judiciary Committee's Subcommittee on Courts and Intellectual Property for the opportunity to express our views here today. We encourage the Committee to contact us should there be any questions regarding our concerns about H.R. 1714, S.B. 761 or if you would like more information about the Uniform Electronic Transactions Act.

APPENDIX

June 17, 1999
Memorandum to U.S. Commerce Committee Regarding H.R. 1714

July 6, 1999
Memorandum to Interested Parties Regarding Impact of Mark-up for S.B. 761

August 4, 1999
Letter to Honorable Tom Bliley Regarding H.R. 1714

August 16, 1999
Memorandum to Interested Parties Regarding H.R. 1714 and S.B. 761

Mr. COBLE. Mr. Cooper?

STATEMENT OF SCOTT COOPER, MANAGER, TECHNOLOGY POLICY, NEWLETT-PACKARD CO.

Mr. COOPER. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to testify today on the issue of creating legal certainty for electronic signatures and on the E-sign bill, H.R. 1714, in particular.

As stated, I am Manager for Technology Policy for the Hewlett-Packard Company, which is a global leader in computing and Internet issues. HP has a great interest in the growth of electronic services. Therefore, I want to commend you for holding this hearing on the electronic signatures legislation.

The continued growth of electronic commerce depends upon the development of a legal framework of electronic contract law that will supply uniformity and legal certainty to transactions in the electronic marketplace. The legal authentication of contracts and transactions is a necessary first step in the development of a legal framework. Without a core foundation of legal certainty that online transactions will be honored and afforded the same rights that obligate other commercial transactions, electronic commerce will never achieve its full potential. Creating a regime of electronic signatures that has both legal certainty and widespread consumer acceptance is therefore an important policy goal.

In a sense, this legislation is actually Rev.2 in the effort to create a legal framework for electronic commerce. Last year, Congress passed important e-commerce legislation in the Government Paperwork Elimination Act, S. 2107, which allows citizens to download Federal forms through their computer. This Public Law also establishes a process where commercially available electronic signatures can then be used to return those filled-out forms back to the government.

As there are over 7,000 individual Federal forms which were filled out by the public 26 billion times last year, S. 2107 provided important Federal leadership for the development of open, technology-neutral standards for electronic signatures.

Just as important, however, was the precedent that the Government Paperwork Elimination Act sets in ensuring that the legal

framework for electronic signatures continues to move down the path of open systems that are not limited to any particular technologies and which are also available in the open marketplace.

Unfortunately, other countries around the world are not necessarily following this same open process that we are in this country. A number of countries, including Japan and China, have taken steps to create technology-specific electronic signature laws. At least two nations, Germany and Italy, have passed such laws.

The E-sign bill addresses this very important issue and directs the U.S. Government to "identify constraints imposed by foreign nations or international organizations that constitute barriers to providers of electronic signature products or services." .

The E-sign bill recognizes this need to harmonize international laws governing the use of electronic signatures so electronic commerce can flourish globally. An important foundation to the creation of that seamless global marketplace must be the elimination of existing technology-specific national laws of electronic authentication and electronic signatures. Legal standing for electronic signatures should be performance-based, i.e., that they are secure, easily available, and user friendly, and not design-based; that is, specifically mandated technologies. This reflects the need for technology neutrality in the development of a legal framework for electronic contracts.

Therefore, the goal must be to allow multiple technologies to compete in the marketplace and not default to government mandates to determine which authentication technologies will be used for global electronic commerce. Businesses and consumers must also be allowed to choose from commercially available technologies; that contracts executed electronically will be presumed to have legal validity; and that the parties will have an opportunity to prove in court that their choice of authentication was legally valid.

One of the concerns that has been raised about moving forward on electronic signatures legislation is that it might cause harm to existing State consumer protection laws. HP is committed to the goal that this legislation on electronic signatures or any legislation dealing with electronic commerce should not just offer consumer protections equal to those available in the paper world but also should be consumer-empowering.

We have already seen significant examples of how e-commerce competition drives prices down, offers more choices, and provides consumers with the necessary material information they need to make informed purchasing decisions. There is also no question that the growth of electronic commerce will require new, innovative approaches to enforcing traditional consumer protections.

Just last week, Hewlett-Packard and the Better Business Bureau announced in Paris at the Global Business Dialogue Meeting on Electronic Commerce a new global initiative on consumer protection through the use of alternative dispute resolution mechanisms, ADRs. The use of consumer-friendly dispute settlement procedures for global e-commerce can offer cross-border consumer protections, no matter where the consumer or vendor is located.

As well, HP supports the privacy disclosure requirements listed in H.R. 1685, sponsored by Congressman Rick Boucher and Bob Goodlatte. HP endorses the idea that all commercial websites

should be required to disclose in a clear and conspicuous manner what it is they do with a consumer's personal data. Under this approach, consumers can make an informed choice whether they want to continue the transaction on that website or to go to another that has a privacy disclosure more to their liking. If consumers in the marketplace decide that privacy is important to them, then the competitive advantage should be with those sites that have more stringent privacy policies.

In conclusion, I would like to say that crafting the right approach toward consumer protections in the electronic marketplace at both the domestic and global environment must be a priority issue for both government and industry. An electronic signatures bill should not in any way diminish existing legal protections. But we can move forward in creating a legal framework for electronic signatures that will help empower consumers without putting at risk a consumer's right to traditional consumer protections. As well, the United States needs to show global leadership in creating a legal framework of open authentication systems that are not limited to any particular technologies. Those should be the necessary and achievable goals of this legislation.

Thank you, and I will be happy to answer any questions.

Mr. GOODLATTE. [Presiding.] Thank you, Mr. Cooper.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF SCOTT COOPER, MANAGER, TECHNOLOGY POLICY, HEWLETT-PACKARD CO.

Mr. Chairman, and members of the Committee, thank you for the opportunity to testify today on the issue of creating legal certainty for electronic signatures, and on the E-SIGN bill, H.R. 1714, in particular. By way of reference, I serve as chair of the Electronic Commerce committee of the Information Technology Industry Coalition (ITI) an association of 26 of the largest high-tech companies in America with world-wide revenues exceeding $450 billion. Along with the Chamber of Commerce, the NAM, the American Electronics Association (AEA), and the Information Technology Association of America (ITAA), ITI has endorsed the Senate electronic signatures bill, S. 761. I am speaking today however only in my role as Manager for Technology Policy for the Hewlett-Packard Company. As a global leader in computing and Internet issues, HP has a great interest in the growth of electronic services, and therefore I want to commend you for holding this hearing on electronic signatures legislation.

The continued growth of electronic commerce depends on the development of a legal framework of electronic contract law that will supply uniformity and legal certainty to transactions in the electronic marketplace. The legal authentication of contracts and transactions is the necessary first step in developing that legal framework. Without a core foundation of legal certainty—that online transactions will be honored and afforded the same rights that obligate other commercial transactions—electronic commerce will never be able to achieve its full potential. Creating a regime of electronic signatures that has both legal certainty and widespread consumer acceptance is therefore an important policy goal.

In a sense, this legislation is actually Rev.2 in the effort to create a legal framework for electronic commerce. Last year, Congress passed important e-commerce legislation in the "Government Paperwork Elimination Act" (S.2107), which allows citizens to download federal forms through their computer. This public law also establishes a process where commercially available electronic signatures can then be used to return these filled-out forms back to the government. As there are 7,000 individual federal forms, which were filled out by the public 26 billion times last year, S.2107 provided important federal leadership for the development of open, technology-neutral standards for electronic signatures.

By making government forms available electronically, citizens will benefit from the ease and convenience of downloading and returning federal forms through the Internet. Having federal agencies go 'on-line' will also result in a significant lowering of their transaction costs for sending and receiving federal forms. Businesses

will also be able to electronically collect, store and file government forms. Companies large and small will benefit from replacing paper copies and postage with simple and cost-effective electronic forms. For Hewlett-Packard, the savings will be $1 million per year for just one form alone: the IRS W–4 form.

Just as important however, is the precedent that the Government Paperwork Elimination Act sets in insuring that the legal framework for electronic signatures continues to move down the path of open systems that are not limited to any particular technologies, and are also available in the open marketplace. Unfortunately other countries around the world are not necessarily following the same open process that we are in this country. A number of countries, including Japan and China have taken steps to create technology-specific electronic signature laws. And at least two nations—Germany and Italy—have passed such laws.

The E-SIGN bill addresses this very important issue, and directs the U.S. government to "identify constraints imposed by foreign nations or international organizations that constitute barriers to providers of electronic signature products or services. . . ." [Sec. 210(a)(1)(B)] The E-SIGN bill recognizes this need to harmonize international laws governing the use of electronic signatures so that electronic commerce can flourish globally. An important foundation to the creation of that seamless global marketplace must be the elimination of existing technology-specific national laws of electronic authentication and electronic signatures. Legal standing for electronic signatures should be "performance based", (i.e. that they are secure, easily available and user friendly) not "design based" (i.e. a specifically-mandated technology), in order to reflect the need for technology neutrality in the development of a legal framework for electronic contracts.

The goal for any global electronic signature regime must be to allow multiple technologies to compete in the marketplace and not default to government mandates to determine which authentication technologies will be used in global electronic commerce. Businesses and consumers must also be allowed to choose among commercially-available technologies; that contracts executed electronically will be presumed to have legal validity; and that the parties will have the opportunity to prove in court that their choice of authentication was legally valid.

One of the concerns that has been raised about moving forward on electronic signatures legislation is that it might cause harm to existing state consumer protection laws. HP is committed to the goal that *this* legislation on electronic signatures, or *any* legislation dealing with electronic commerce should not just offer consumer protections equal to those available in the paper world, but should also be consumer-empowering. We have already seen significant examples of how E-commerce competition drives prices down, offers more choice and provides consumers with the necessary material information they need to make informed purchasing decisions. We also need to ensure that this new electronic medium is also a clean well-lighted marketplace. If a consumer protection law now states that certain transactions require that a notice or disclosure to be offered in writing, then the burden should be on the electronic substitute to prove that it can meet a similar or higher standard of disclosure and authentication.

There is no question that the growth of electronic commerce will require new innovative approaches to enforcing traditional consumer protections. Just last week, Hewlett-Packard and the Better Business Bureau announced in Paris at the Global Business Dialogue meeting on Electronic Commerce a new global initiative on consumer protection through the use of alternative dispute resolution mechanisms (ADR's). The use of consumer-friendly, dispute-settlement procedures for global E-commerce can offer cross-border consumer protections no matter where the consumer or vendor is located.

As well, HP supports the privacy disclosure requirements listed in H.R. 1685, sponsored by Congressmen Rick Boucher and Bob Goodlatte. HP endorses the idea that all commercial websites should be required to disclose in a clear and conspicuous manner, what it is that they do with a consumer's personal data. Under this approach customers can make an informed decision whether they want to continue a transaction with that website or go to another that has a privacy disclosure more to there liking. If consumers in the marketplace decide that privacy is important to them, then the competitive advantage will be with those sites that have more stringent privacy policies.

Crafting the right approach toward consumer protections in the electronic marketplace at both a domestic and global environment must be a priority policy issue for government and industry. And an electronic signatures bill should not in any way diminish existing legal protections. But we can move forward in creating a legal framework for electronic signatures that will help empower consumers without putting at risk a consumer's rights to traditional consumer protections. As well, the United States needs to show global leadership in creating a legal framework of open

authentication systems that are not limited to any particular technologies. Those should be the necessary—and achievable—goals of this legislation.

Mr. GOODLATTE. Mr. Peyton?

STATEMENT OF DAVID PEYTON DIRECTOR, TECHNOLOGY P, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. PEYTON. Thank you very much.

I am with the National Association of Manufacturers, which represents 14,000 companies—10,000 of them are small businesses—with 85 percent of America's manufacturing capacity.

The overall theme that guides every policy position that the NAM takes is promoting faster economic growth. In the last several years, the realization has become widespread that technology applications indeed drive our economic growth. By our calculations, seconded by numerous other assessments, technology applications account for two-thirds of labor productivity growth and one-third of long-term economic growth.

Any pro-growth stance leads one, ineluctably, to support legislation to boost productivity and to facilitate e-commerce. In the former category fall such measures as boosting Federal spending on civilian science, establishing a permanent R&D tax credit, and modernizing the patent system. For the latter, one clearly needs adequate computer security, including electronic message protection by encryption and signature protection, and additional progress in intellectual property rights and Internet privacy protection.

The NAM is pleased at the growing consensus on a number of these questions, as reflected in the House Republican leadership's E-Contract, and the New Democrat Network's E-Genda, both of which specifically mention electronic signatures.

That brings us to the significance of the legislation before us this morning. Allow me to quote from the May 26 letter to Senator Abraham in support of S. 761, signed not only by the NAM, but also by the U.S. Chamber of Commerce, the Information Technology Industry Council, the Information Technology Association of America, and the American Electronics Association.

During the last Christmas shopping season, American consumers opted in record numbers for the convenience and speed of point-and-click Internet-based transactions.

Business-to-business transactions must go beyond the credit card domain. Today, legal uncertainty and nonconformity push firms down to the lowest common denominator of paper contracts for interstate commerce, which precludes complete automation.

Here is the key policy problem: American business is eager to get rid of paper contracts, but the process of developing and enacting a uniform State law on electronic contracting is far from complete. Enactment of this model law by all 50 States could take several more years. In the world of e-commerce, that is simply too long. S. 761 can act as a highly effective bridge loan until all 50 States agree on the rules for electronic transactions.

Going on, Mr. Chairman, we are not market forecasters, but we are sure of two things:

First, there are great internal administrative savings to be achieved. Don Peterson, the chief financial officer of Lucent and a

NAM board member, has compared the costs of traditional procurement transactions and new electronically-enabled ones. The cost goes down from $5 to $1.50. That adds up to billions in savings for industry.

Second, at the level of manufacturing operations, the frontier is the cooperation among firms. Almost 3 years ago, the Next Generation Manufacturing Report called the close work among companies in a supply chain an "extended enterprise." Our own series of Technology in the Factory Floor Reports, conducted with Auburn University and based on answers from about a thousand plant managers, shows that firms have essentially reached saturation with stand-alone automated machines. They are now moving aggressively to link them in factories.

The next leap, already well under way in the electronics industry, allows companies to specialize in a new way. The virtual manufacturer does the R&D, product design, marketing and support. The contract manufacturer specializes in rapid setup and reconfigurations, slices out middle management, and does the actual fabrication. We assure you that the account to this effect in the current cover story in Business Week is accurate.

For these reasons, the NAM commends the legislation as it stands in the Senate. It accomplishes the fundamental purpose of giving legal effect to e-signatures in interstate commerce, with the important provision that the actions of authorized intelligent agents will be recognized, as in the model law.

At the same time, it shaves down the unavoidable degree of preemption to the minimum. Moreover, it gives explicit effect to the understanding that many of us supporting the bill have had, that it should not alter existing Federal or State consumer protections.

Mr. Chairman, we believe that passage of e-signature legislation this year is not only desirable but achievable. Enactment of an e-signature law would represent a solid legislative achievement for the 106th Congress.

Let me hasten to add that this subcommittee has been by far the most productive one in the entire Congress on technology issues. The Courts Subcommittee has yielded legislation to assure that Americans can use encryption, to modernize the patent system, and to protect databases, with the prospect of action to protect product identification codes as well.

The NAM has had the privilege of working with this subcommittee in almost all these endeavors and appreciates the opportunity to take part in this proceeding as well. The subcommittee can continue its outstanding record by reporting H.R. 1714 right away, preferably in a version close to what has been negotiated to the relative satisfaction of various parties in the Senate.

Mr. Chairman, I would be happy to take questions.

Mr. GOODLATTE. Thank you.

[The prepared statement of Mr. Peyton follows:]

PREPARED STATEMENT OF DAVID PEYTON, DIRECTOR, TECHNOLOGY P, NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning, Mr. Chairman. I am David Peyton, Director, Technology Policy for the National Association of Manufacturers (NAM), which represents 14,000 companies—10,000 of which are small businesses.

The overall theme that guides every policy position that the NAM takes is promoting faster overall economic growth. In the last several years, the realization has become widespread that technology applications drive our economic growth. By the NAM's calculations, seconded by numerous other assessments, technology applications account for two-thirds of labor productivity gains and one-third of long-run economic growth.

Any pro-growth stance leads one, ineluctably, to support legislation to boost productivity and to facilitate e-commerce. In the former category fall such measures as boosting federal spending on civilian science, establishing a permanent R&D tax credit, and modernizing the patent system. In the latter category, measures clearly needed are adequate computer security, included electronic message protection by encryption and signature protection, and addition progress in intellectual property rights and Internet privacy protection. The NAM is pleased at the growing bipartisan consensus on a number of these questions, as reflected in the House Republican Leadership's "E-Contract" and the New Democrat Network's "E-Genda," both of which specifically mention electronic signatures.

It's no secret that the information technology industry is enjoying both the greatest internal productivity gains and, simultaneously, generating external growth for other industries. The stock market has risen in total capitalization by about $11 trillion, of which about 80 percent represents intangibles, such as intellectual property rights and business models, rather than traditional physical assets. In the last two weeks, both *Newsweek* and *Business Week* have run cover stories on the Internet's transformative effects.

That brings us to the significance of the legislation before us this morning. Allow me to quote from the May 26 letter to Senator Abraham in support of S. 761, signed not only by the NAM but also by the U.S. Chamber of Commerce, the Information Technology Industry Council, the Information Technology Association of America, and the American Electronics Association:

> During the last Christmas shopping season, American consumers opted in record numbers for the speed and convenience of Internet-based transactions. Point-and-click credit-card purchases for limited sums rested on the underlying structure of one-time paper contracts among credit-card associations, banks and consumers.
>
> Business-to-business transactions—by most credible projections, ultimately far larger than consumer sales—must go beyond the credit-card domain. Today, legal uncertainty and non-conformity push firms down to a lowest common denominator of paper contracts for interstate commerce, which precludes complete automation.
>
> Here is the key policy problem: American business is eager to get rid of paper contracts, but the process of developing and enacting a uniform state law on electronic contracting is far from complete. Before electronic commerce can reach its full potential, business must be provided assurance that traditional signature law encompasses electronic authentication. Unfortunately, some states still do not have such laws, and the ones that do are far from uniform.
>
> Diligent work by the National Conference of Commissioners on Uniform State Laws will yield, later this year, a "Uniform Electronic Transactions Act." Even so, enactment of this model law by all 50 states could take several more years. In the world of e-commerce, with its unprecedented business velocity, that is simply far too long. S. 761 can act as a highly effective "bridge loan" until all 50 states agree on the rules for electronic transactions. We hope that as many states as possible will enact the model law forthwith, thus reducing business uncertainty, and intend this bill to hasten that process at a time when foreign competitors do not face similar legal challenges from a federal governmental system.

We are not market forecasters, Mr. Chairman, and have no numbers to add to the market aggregates that many are predicting. But we are sure of two things:

- First, eliminating paper contracts will achieve great internal administrative savings. Don Peterson, the chief financial officer of Lucent and an NAM board member, has compared the costs of traditional procurement transactions and new electronically enabled ones. The cost goes down from $5 to $1.50 per transaction. That will add up to billions in savings for industry.
- Second, at the operations level in manufacturing, cooperation is the new frontier among firms. Almost three years ago, the Next-Generation Manufacturing Report called the close work among companies in a supply chain an "extended enterprise." Our own series of *Technology on the Factory Floor* Reports, conducted with Auburn University and based on answers from about

1,000 plant managers, shows that firms have essentially reached saturation with stand-alone automated machines and are now moving aggressively to link them in factory networks. The next leap, already well underway in the electronics industry, allows companies to specialize in a new way. The virtual manufacturer does the R&D, product design, marketing and support. The contract manufacturer specializes in rapid setup and reconfigurations, slices out middle management, and does the actual fabrication. We assure you that the account to this effect in the current cover story of *Business Week* (October 4, 1999, "The Internet Age") is accurate.

For these reasons, the NAM commends the legislation as it stands in the Senate. It accomplishes the fundamental purpose of giving legal effect to e-signatures in interstate commerce, with the important provision that the actions of authorized intelligent agents will be recognized, as in the model law. At the same time, it shaves down the unavoidable degree of preemption to the minimum, in recognition of federal-state comity. Moreover, it gives explicit effect to the understanding that many of us supporting the bill already known that it should not alter existing federal or state consumer protections.

Mr. Chairman, we believe that passage of e-signature legislation this year is not only desirable but also achievable. Even with the growing and welcome bipartisan consensus on technology issues, the 106th Congress has enacted, thus far, only two technology-related measures: amendments to the Fastener Quality Act, and the second Y2K law. Enactment of an e-signature law would represent a solid legislative achievement for the 106th Congress.

Let me hasten to add, this Subcommittee has been, by far, the most productive one in the entire Congress on technology issues. The Courts Subcommittee has yielded legislation to assure that Americans can use encryption, to modernize the patent system and to protect databases, with the prospect of action which will protect product identification codes, as well. The NAM has had the privilege of working with this Subcommittee in almost all of these endeavors and appreciates the opportunity to take part in this proceeding, as well. The Subcommittee can continue its outstanding record by reporting H.R. 1714 right away, preferably in a version close to what has been negotiated to the relative satisfaction of various parties in the Senate.

Mr. Chairman, I would be happy to take questions afterwards.

Mr. GOODLATTE. Ms. Saunders, we are delighted to have you with us. We welcome your testimony.

STATEMENT OF MARGOT SAUNDERS, MANAGING ATTORNEY, NATIONAL CONSUMER LAW CENTER

Ms. SAUNDERS. Thank you, Mr. Chairman and members of the committee.

On behalf of the National Consumer Law Center, I would like to state our appreciation for being here today.

I represent low-income consumers through the various legal services programs around the country. I also offer our testimony today on behalf of the Consumers Union, the Consumer Federation of America, and the U.S. Public Interest Research Group.

We are not opposed to facilitating electronic commerce. Indeed, we believe that once access to the Internet is more widely available to all Americans, especially the Nation's poor and elderly, there may be many new and beneficial opportunities made available. However, for electronic commerce to benefit consumers, the consumer protections that are currently required in the physical world must also apply to electronic transactions. As currently written, H.R. 1714 does not assure that consumers who are looking for credit, goods, and services in the physical world will not be asked to sign over their rights regarding receipt of further information that they would be entitled to receive in writing the physical world and receive this information electronically, instead.

We do not seek in this bill to add consumer protections to the electronic marketplace that are not existent in the physical. But special issues must be addressed because of the differences between the physical world and the electronic world. For example, when a law requires a document to be in writing, there are a number of inherent assumptions that automatically apply to that writing that are not necessarily applicable to the electronic record.

A paper writing is, by its nature, tangible. Once handed to a person, it will not disappear unless the person makes it disappear. The printed matter on the paper writing will not change every time someone looks at it, and the writing itself can later be used to prove the contents of the writing.

None of these assumptions apply to electronic records. An electronic record can be sent to a person who does not know it is there because the person does not have mail. The electronic record could be provided in a format which is not retainable by the viewer of the record. Even if the viewer is able to download and print the record, it may not be printable in the same format in which it appears on the screen. Once downloaded, an electronic record may be inadvertently changed by the viewer every time it is brought up on the screen. If this is possible, the electronic record is no longer available to use to prove its contents.

To maintain the status quo, we need to import those basic assumptions into the electronic world, some of which has been accomplished by the manager's amendment to Senate bill 761.

On electronic signatures there is a similar concern. When we think about our physical signature and an electronic signature, the equation is not exact. A much better equation is that an electronic signature is really like a credit card. It is an electronic device outside of one's own body that has the power to bind the owner to the promise to pay, or to another promise.

Unauthorized use is a very likely possibility. Who should bear the burden of loss when there has been an unauthorized use of an electronic signature? Congress in 1974 decided in the development of the credit card system that unauthorized use in that situation should be borne, when there is an unsatisfactory answer to the question, by the industry. In that way, Congress decided that the industry should have the burden of establishing a technology that will limit the losses to a minimum, because they will bear the losses from fraud and breakdown of the system.

We think that these same issues should be addressed in electronic signatures as well.3

I would be glad to answer any questions.

Mr. GOODLATTE. Thank you very much.

[The prepared statement of Ms. Saunders follows:]

PREPARED STATEMENT OF MARGOT SAUNDERS, MANAGING ATTORNEY, NATIONAL CONSUMER LAW CENTER

Mr. Chairman and Members of the Committee, the *National Consumer Law Center*[1] appreciates the opportunity to provide comments regarding the impact of HR

[1]The *National Consumer Law Center* is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appro-

Continued

1714, the "Electronic Signatures in Global and National Commerce Act" on consumers. We offer our testimony here today on behalf of our low income clients, as well as *Consumers Union*,[2] the *Consumer Federation of America*[3] and the *U.S. Public Interest Research Group*.[4]

Our comments regarding the problems with HR 1714 should not be construed to indicate that we are opposed in any way to facilitating electronic commerce. We are not. Indeed, we believe that once access to the Internet is more widely available to all Americans, especially the nation's poor and elderly, there may be many new and beneficial opportunities made available. *However, for electronic commerce to benefit consumers, the same basic consumer protections which are required in the physical world must apply to electronic transactions.* As currently written, HR 1714 does not assure that consumers who are looking for credit, goods and services both through the Internet, *and in the physical world* will not be victimized by overreaching merchants of goods and services.

The bill authorizes businesses to replace paper records, such as warranties, contracts, and notices, with electronic records regardless of whether the transaction is conducted online or offline and regardless of whether the consumer has the equipment and ability to access information electronically. Paper disclosures required by law are designed to serve consumers' interests by providing them with information critical to making informed choices in the marketplace, understanding their rights and obligations during commercial transactions, and enforcing their rights when transactions go sour. Consumers can potentially benefit from receiving information electronically. However, the broad-brush approach of H.R. 1714 will sacrifice important standards and nuances in state and federal consumer law, and erode consumer trust and confidence in electronic commerce.

The bill fails to require the following reasonable elements:

- The consumer actually consents to receive electronic records (instead of being required to consent as-a condition of entering into the transaction);
- The consumer actually has a computer to access the electronic records;
- The consumer's computer actually has the technological capacity to receive, retain and print the electronic records; The electronic records be provided in a "locked" format which allows the electronic records to be produced to a court at a later date in a manner which can be used to prove the contents and the date the record was received (although this locked format is required in documents whenever electronic signatures are used (Sec. 104(2));
- The consumer is able to receive paper copies of electronic records in situations where the consumer was unable to access or retain the electronic record.

Electronic signatures are provided the same legal status as handwritten signatures without any consumer protections. Although the bill would give equal weight to an electronic signature as it would to a handwritten signature, there are no requirements that:

- Electronic signatures meet certain standards to provide all parties with assurances against forgery;
- The technologies are accessible equally to both parties in the transaction;
- The technologies provide consumers with protection from loss if there is a technology failure.

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priate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen examples of predatory lending to low-income people in almost every state in the union. It is from this vantage point—many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities—that we supply this testimony today. *Cost of Credit* (NCLC 1995), *Truth in Lending* (NCLC 1996) and *Unfair and Deceptive Acts and Practices* (NCLC 1997), are three of twelve practice treatises which NCLC publishes and annual (supplements. These books as well as our newsletter, *NCLC Reports Consumer Credit & Usury Ed.*, describe the law currently applicable to all types of consumer loan transactions.

[2] *Consumers Union* is a nonprofit organization that publishes *Consumer Reports*.

[3] The *Consumer Federation of America* is a nonprofit association of some 250 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[4] The *U.S. Public Interest Research Group* is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

Discussion of HR 1714

H. R. 1714 would preempt every state and federal law that requires a paper writing to be provided to a consumer. In each case, an electronic record could be provided instead. State requirements that certain information be given to consumers in writing often are adopted because of a history and pattern of harm to their citizens. Required paper notices and documents are critically important to ensure that consumers are apprized of their rights and obligations. Replacing these essential paper notices and contracts with electronic records should not be done without adequate assurances that consumers will be able to receive and retain electronic information. These state and federal laws should not be lightly swept away.

The bill would allow businesses to provide essential consumer information exclusively online-regardless of whether the transaction occurs on or off line. Nearly two thirds of the American public, and an even larger percentage of low income and minority citizens, do not have access to the Internet. This bill would limit, or eliminate, their access to information deemed critical to a functioning marketplace under state and federal law.

H.R. 1714 would permit electronic disclosures to substitute for paper notices even when the consumer doesn't know that he or she has consented to electronic communication, doesn't have a computer, or can't print the information when it is received. There are no requirements in the bill for meaningful, actual agreement by the consumer to receive records electronically. In almost every transaction between consumers and business it is a "take it or leave it" proposition for the consumer. Nothing in the bill regarding the intent of the parties (Sec. 6(c)) would prevent consumers from being required to accept electronic records instead of paper writings. One can easily imagine computer kiosks on businesses' premises at which consumers would be required to electronically consent to receiving electronic records, as a condition of doing business.

The bill expects that consumers entering into a transaction: a) understand the importance of disclosures and information not yet received; b) understand the technology and capability of a computer to receive, retain and print information before it is received; and, c) assess whether the technology and capacity to receive, retain and print the information will be available at uncertain dates in the future. In many transactions there are ongoing requirements for paper correspondence, including statements of accounts, notices of default, information on escrow accounts, change in mortgage services. Under H.R. 1714 the business will not be required to provide paper copies. Crucial information about the consumer's rights and obligations will not be received.

To provide reliable documentation of transactions, information provided electronically must be tamper proof. Documents provide certainty to transacting parties, capturing the terms of the agreement Courts and others who are later called upon to interpret and enforce agreements rely on paper records to construct the parties' intent. For electronic information to provide the same certainty to the parties and the courts they must be protected from both inadvertent and intentional changes. If a consumer inadvertently changes a single byte on an electronic document, or an electronically provided notice is deleted during a business' overhaul of their Web site, the documents will be unavailable or useless if disputes arise.

The bill directs courts to give electronic signatures the same weight as their handwritten counterparts without addressing the heightened risks of forgery, duplication, and identity theft evident in today's online marketplace. The bill inappropriately allows businesses to make complicated technology choices and put the risks on consumers. Businesses have access to information about electronic commerce-enabling technology and the ability to limit, and plan for, the risks created by electronic commerce. Consumers have neither the access to information nor the expertise necessary to evaluate the appropriateness of a given technology. Permitting risk shifting to consumers in this situation is bad policy.

To ensure that a robust infrastructure for electronic commerce emerges Congress should place the responsibility and liability for technology failures squarely on the shoulders of certificate authorities, manufacturers, or the businesses dictating the technology to be used. The bill permits "the parties to such contract or agreement [to] establish reasonable requirements regarding the types of electronic records and electronic signatures acceptable to such parties." When the two parties to a transaction are a consumer and a large business the gross inequality of bargaining power will lead to businesses dictating the authentication technology and requiring the consumer to bear the risk. The security of online interactions is critical to both businesses and consumers.

Dishonest businesses could require or permit a form of authentication to be used that is corruptible or unreliable. The use of weak authentication tools may place the consumer in a worse position than the absence of authentication. In the consumer

context, the risk of misunderstanding any risk-shifting consequences for adopting an authentication procedure are even greater than in the business to business context since such a rule is directly contrary to the rules that now apply in other similar consumer transactions. As a result, a law that peremptorily establishes the legality of any authentication technology agreed to must ensure that consumers are not bound by the unauthorized use of an online authentication procedure. Unless fraud and error losses associated with online transaction technology&&,are allocated to technology providers and online vendors, there will be no incentive for investment in the further improvement of the technologies in use. Liability standards must be clearly established in the law.

Electronic commerce requires the development of reliable methods of verifying the identity and capacity of contracting parties. We look forward to a robust online marketplace built upon strong security protections for the individual's identity, personal information, commercial transactions and communications. However, at this time such a framework does not exist. Requiring courts to give the same weight to electronic signatures without assessing the different risks posed by online commerce may unintentionally harm consumers.

Encouraging electronic commerce and protecting consumers need not be competing goals. The key to facilitating electronic commerce while protecting consumers' interests is to ensure that all of the assumed elements to a transaction in the physical world are in existence in electronic commerce.

Necessary Consumer Protections for Electronic Commerce

We do not seek in this bill to add consumer protections to the electronic marketplace that are not in existence in the physical. *We do seek to ensure that the consumer protections that apply in the physical world are equally applicable to ecommerce.* Special issues must be addressed because of the differences between the physical world and the electronic world. For example, when a law requires a document to be in writing there are a number of inherent assumptions that automatically apply to that writing that are not necessarily applicable to an electronic record.

A paper writing is by its nature tangible, once handed to a person it will not disappear unless the person makes it disappear. The printed matter on the paper writing will not change every time someone looks at it, and the writing can be used at a later to prove its contents.

None of those assumptions apply to an electronic record. An electronic record can be sent to a person who does not know it is there, because the person does not have email (and unlike the U.S. Postal Service, there is no reasonable guarantee of delivery of email). The electronic record could be provided in a format which is not retrainable by the viewer; even if the viewer is able to download the electronic record, it may not be printable in the same format in which it was viewed. Once downloaded the electronic record may be inadvertently changed by the viewer every time it is brought up on the screen; and if this is possible the electronic record thus becomes useless to prove 'its contents.

Consumer Protections for the Use of Electronic Records

To maintain the status quo; to continue to ensure that consumers are protected while ensuring that a healthy and vigorous electronic marketplace continues to thrive, the same assumptions that apply in the physical world must be made explicitly applicable to electronic commerce. In consumer transactions, electronic records should be permitted to replace paper writings only when the following rules are in place:

1. Electronic contracts should only be allowed to replace paper contracts when the transaction truly occurs in electronic commerce. Electronic contracts should not be permitted to replace paper contracts when the transaction has actually occurred in person. (The Uniform Electronic Transaction Act partially addresses this issue; Sec. 5(b))
2. Electronic contracts should only be permitted to replace paper contracts when the basic assumptions that are inferred about paper are required to be applied to the electronic transaction :a)
   a) The consumer must have the capacity to receive, retain and print the electronic contract.
   b) The contract must be provided to both parties in a format that they can each retain, and print. *(S. 761 has language on this point; Sec. 6(c)).*
   c) The contract must be provided to both parties in a format that prevents alteration after it has been received. *(HR 1714 has language that somewhat addresses this point, Sec.104(2)(C).)*

3. Consumers should be permitted to request paper copies of their electronic contracts to address the possibility that a consumer may be mistaken about the capacity of a computer to receive, retain or print the electronic contract. This is especially necessary if the law permits parties to contract from public access computers such as in public libraries or schools, or shopping malls.
4. Electronic records should not be permitted to replace written notice and disclosures which are provided at a time later than the contract is entered into, unless specific rules are developed to C) requires the integrity of the record.
   a) ensure that the consumer continues to have the capacity and willingness to receive the electronic records;
   b) establish reasonable rules regarding electronic delivery and electronic receipt of these records which are equivalent to the delivery rules in the physical world in state law (*The Uniform Electronic Transaction Act imperfectly addresses this issue; Sec.s 15(a) and (b).)*
   c) requires the integrity of the record.

(*S. 761 addresses this issue by disallowing electronic records altogether when other rules or regulations govern the notice or disclosure, such as when the notice must be provided in writing, Sec. 6(b).)*

Consumer Protections for the Use of Electronic Signatures

Similarly, the assumptions about physical signatures do not easily translate to electronic signatures. In the real world context, in a court proceeding a person who denies that the signature on a contract is really his must present some proof before the party claiming under the signature is required to prove it is valid.[6] Proof that a person's signature was *not* made by that person is relatively easy to present; one can simply say "Look, it doesn't look like my signature, here is what my signature really looks like." Or "I was nowhere near the place the contract was signed on that day, I was at the beach, and here is my hotel receipt to prove that I was at the beach." Once some proof is provided challenging the validity of the signature, the rules as to which party then has the burden of proof on the validity of the signature vary depending upon whether the contract in question is governed by the Uniform Commercial Code or by common law contract law. But the significant point is that in both cases, in order to open up the question regarding the validity of the physical signature *some* proof must be provided.

HR 1714 would simply transfer these common law rules of burdens of proof to the validity of electronic signature. But these rules do not translate into a fair system in the context of electronic commerce. Asking a person to provide some proof that an electronic signature was *not* made by that person is asking a person to provide proof of a negative. All a person can really say is something along the lines of-. "I did not sip that document." "It was not me that typed in the password, or the macro that initiated my digital signature." What kind of proof can an individual offer to show that they did not type in some letters or words in an electronic transaction? It will be virtually impossible for individual consumers to prove this negative. The result will be that many, many consumers will be forced to pay for goods or services they did not purchase, and from which they did not benefit.

Of course, these concerns may not apply when electronic signatures are based upon biometrics. But HR 1714 covers all electronic signatures, the typing of one's initials, a digital signature, or a thumb print, and more.

There is a better framework to apply to electronic signatures than simply the common law rules of physical signatures: the rules created by this Congress for the

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[6] "Until evidence is produced that the signature is forged or unauthorized, the holder is not required to prove the signature's authenticity even if denied, in the answer and the holder in due course has the right to rely upon the presumption of authenticity. On motion for summary judgment the movant, who asserts forgery as a defense, has the burden of proof that the signature is not authentic and if so, not authorize, even though the respondent holder in due course would have such burden at trial." *South Trust Bank* v. *Parker, 226 Ga. App. 292, 486 SE2D 402, 405 (1997).*

The UCC section referred to in the above case is section 3–308 of the UCC in the revision. The Official Comment says in part: "The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized except as stated in the second sentence of (a) ["if the validity . . . is denied"] "The defendant is therefore required to make some sufficient showering of the grounds for the denials before the plaintiff is required to introduce evidence . . . Once such evidence is introduced, the burden . . . is on the plaintiff" But note the following in the Comment "The presumption [of validity] rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant." In the electronic environment, this arguably no longer true.

use of credit cards under the Fair Credit Billing Act.[6] Congress realized when the credit card system was authorized that it was logical and appropriate to put the risk of loss from fraud, theft, or system failure on the industry creating and maintaining the credit card system. The clear beneficiaries of this statutory transfer of risk of loss: the credit industry which has enormous profits from credit cards, and merchants for whom the use of credit cards facilitates millions of dollars of sales each year.

An electronic signature is much more like a credit card than it is like a physical signature. It is an electronic device which binds the holder of the credit card to a promise to pay. An electronic signature is also an electronic device—outside the body of the owner—which can bind the owner to a promise to pay. Unauthorized use is a likely possibility in many situations. Who should bear the burden of loss when this occurs?. If the use of electronic signatures is left to the rules applied to physical signatures, consumers will bear the cost. This will neither be fair, nor will it appropriately facilitate electronic commerce. A better rule would be to put the burden of proof of unauthorized use of electronic signatures on the merchant in merchant to consumer transactions. This will force the electronic commerce industry to create a system for using and accepting electronic signatures that limits losses from fraud, mistake, theft and system breakdowns to an absolute minimum—because the creators of the system will bear the losses. Our proposed rules would be:

1. Electronic contracts must be required to use electronic signatures which are reasonably linked to the contracting parties. *(HR 1714 addresses both the requirement that the electronic signatures agreed to must be reasonable, Sec. 101 (b), and that the electronic signature must be related to the person, Sec. 104(2) (C.)*
2. Electronic signatures must only be permitted to replace physical signatures when the risk of loss from the failure of the authentication technology, either through fraud, mistake technological failure or theft falls on the merchant. In consumer to consumer transaction, the risk of loss can be determined by agreement.

Conclusion

Consumers will welcome the opportunity to engage in safe and secure online transactions. However, safety and security are built upon our long history of providing strong consumer protections. Consumer protections equivalent to those found in the offline world must be built into the online marketplace. HR 1714 should be amended to address the consumer protection concerns identified above, or should exempt all consumer transactions. We look forward to working with you to ensure that consumer protections are a vital pad of the online marketplace.

Summary

Mr. Chairman and Members of the Committee, the *National Consumer Law Center* appreciates the opportunity to provide comments regarding the impact of HR 1714, the "Electronic Signatures in Global and National Commerce Act" on consumers. We offer our testimony here today on behalf of our low income clients, as well as *Consumers Union*, the *Consumer Federation of America* and the *U.S. Public Interest Research Group*.

We are not opposed in any way to facilitating electronic commerce. Indeed, we believe that once access to the Internet is more widely available to all Americans, especially the nation's poor and elderly, there may be many new and beneficial opportunities made available. *However, for electronic commerce to benefit consumers, the same basic consumer protections which are required in the physical world must apply to electronic transactions.* As currently written, HR 1714 does not assure that consumers who are looking for credit, goods and services both through the Internet, *and in the physical world* will not be victimized by overreaching merchants of goods and services.

We do not seek in this bill to add consumer protections to the electronic marketplace that are not in existence in the physical. *We do seek to ensure that the consumer protections that apply in the physical world are equally applicable to ecommerce.* Special issues must be addressed because of the differences between the physical world and the electronic world. For "ample, when a law requires a document to be in writing there are a number of inherent assumptions that automatically apply to that writing that are not necessarily applicable to an electronic record.

A paper writing is by its nature tangible, once handed to a person it will not disappear unless the person makes it disappear. The printed matter on the paper writ-

[6] 15 U.S.C. § 1666. October 28, 1974 (88 Stat. 1513).

ing will not change every time someone looks at it, and the writing can be used at a later to prove its contents.

None of those assumptions apply to an electronic record. An electronic record can be sent to a person who does not know it is there, because the person does not have email. The electronic record could be provided in a format which is not retrainable by the viewer; even if the viewer is able to download the electronic record, it may not be printable in the same format in which it was viewed. Once downloaded the electronic record may be inadvertently changed by the viewer every time it is brought up on the screen; and if this is possible the electronic record thus becomes useless to prove its contents.

To maintain the status quo; to continue to ensure that consumers are protected while ensuring that a healthy and vigorous electronic marketplace continues to thrive, the same assumptions that apply in the physical world must be made explicitly applicable to electronic commerce.

An electronic signature is much more like a credit card than it is like a physical signature. It is an electronic device which binds the holder of the credit card to a promise to pay. An electronic signature is also an electronic device—outside'the body of the owner—which can bind the owner to a promise to pay. Unauthorized use is a likely possibility in many situations. Who should bear the burden of loss when this occurs?. If the use of electronic signatures is left to the rules applied to physical signatures, consumers will bear the cost. This will neither be fair, nor will it appropriately facilitate electronic commerce. A better rule would be to put the burden of proof of unauthorized use of electronic signatures on the merchant in merchant consumer transactions. This will force the electronic commerce industry to create a system for using and accepting electronic signatures that limits losses from fraud, mistake, theft and system breakdowns to an absolute minimum—because the creators of the system will bear the losses.

Mr. GOODLATTE. Judge Sargent, does the Uniform Electronic Transactions Act contain any provisions that will ensure that the legislation will have only minimal effect on the Federal courts with regard to the rules of evidence and admissibility?

Ms. SARGENT. Yes, sir. I believe it does. The reason that I believe that is that the act is basically an enabling act. What the act basically says is that if a law requires something be in writing or have a signature that you cannot deny effect to an electronic record or electronic document or an electronic signature simply because it is electronic.

That does not in any way change any of the law that goes into determining if something is competent to come into evidence. It simply says that it should not be denied on the basis that it is in an electronic media or stored in an electronic media.

You would still have to go through the routine steps you have to go through with any type, even of tangible evidence that you can touch to show that the thing is authentic, that it is what it purports to be, that it is genuine, that it has not been changed. This act does not change that law in any way. It only says it should not be denied admission simply because it is in an electronic medium.

That does not mean you don't also have to prove that the medium is a reliable medium for storing and retrieving information in its original form. But we don't believe that this imposes any burdens or makes any changes on that substantive evidence law that has evolved over the decades.

Mr. GOODLATTE. Do S. 761 and H.R. 1714 contain any similar provisions?

Ms. SARGENT. The big concern that I have or that the conference has and I also have with the Federal legislation is that the UETA has been drafted in a very minimalistic approach to be an enabling act. It has very specific references to make clear that it is not intended in any way to change the substantive law.

This act simply says if you did something on paper before you can now do it electronically if the parties agree to do it electronically. It also says you cannot deny effect to something that is a writing or signature because it is stored or created electronically. The concern about the Federal legislation is that, unlike the UETA, the Federal legislation does not make it clear that all other substantive law controls.

Perhaps one of our biggest concerns is that the Federal legislation, both the Senate bill and the House bill, could have the effect, and in my position as a member of the Federal judiciary I am very concerned about this, could in essence have an effect of federalizing contract law, which has always been a domain of State governments.

Contract law and commercial law has always been the domain of State governments. We have a real concern that the Federal legislation does not make clear, as UETA does in a number of sections, that this act does not in any way change the substantive law that governs the underlying transaction. It only says that you may do it electronically now if you could do it on paper before. We have very specific sections in the act that allow that.

Mr. GOODLATTE. Mr. Peyton, States have traditionally had jurisdiction over contract law. Could passage of H.R. 1714 restrict or even eliminate a State's ability to react to technological change and make adjustments in the law?

Mr. PEYTON. H.R. 1714 as currently written, as previous witnesses have noted, would appear to have some continuing effect even after the State has incorporated the UETA into its body of State law. To the extent that there is continuing effect, then there would necessarily be some kind of restriction on that.

The law that comes to most people's minds first is the Utah law, which I believe was the first State law, which had a number of detailed provisions relating to third-party certificate authorities. Later laws, like that in the Commonwealth of Virginia, tended to be much slimmer laws that simply are enabling ones, as Judge Sargent was describing.

Our purpose is to get a law on the books that serves as a bridge until the States have done the necessary unavoidable incorporation State by State.

Mr. GOODLATTE. Let me ask you and Mr. Cooper, how would that impact the electronic commerce industry?

Mr. COOPER. I think what we are looking for is certainty, so that we can move forward on new applications here. But I think it is also important that that is based upon consensus. I think it has come out from the first panel, and from this panel as well, that this bill that comes out of this Congress, and we hope something does come out, is a minimalist bill.

This is not going to answer all questions. There will be many questions about electronic commerce and electronic signatures and communications that are still remaining to be resolved. I think that is probably the correct approach. We don't know how the market is going to develop. If we decided circa 1999 what we think the market is going to look like in 5 years, we are probably going to be wrong.

So I think the Senate approach, as done in the manager's amendment, is probably where we should be. That is, we take on what we can. We acknowledge the primacy of State contract law. At the same time, we set the marker down that there is a U.S. position on open standards, commercial availability, and technology neutrality on the creation of electronic signatures. Then we tell our U.S. representatives in the international form to take that message to the rest of the world, because the rest of the world so far is doing things that are very technologically specific and very much a top-down approach to electronic signatures.

And if that trend continues, global electronic commerce is going to be harmed.

Mr. GOODLATTE. Very good.

The gentleman from California, Mr. Berman?

Mr. BERMAN. Thank you, Mr. Chairman.

There has been reference to a manager's amendment in the Senate to a bill which has not yet been taken up in the Senate. You sound like, Ms. Saunders, you are familiar with what has been accomplished. First of all, who is the manager?

Ms. SAUNDERS. As I understand it, Senators Abraham and Leahy and Sarbanes have agreed to an amendment to the bill.

Mr. BERMAN. Now I guess the question is, what is in that amendment?

Ms. SAUNDERS. That amendment would, in our view, limit much of the damage that Senate Bill 761 would have originally done, although not all of it. Also, in our view, specifically there is an important change in the definition of UETA in the bill. The original definition of UETA in Senate 761 would not have allowed your State, California, to have adopted its version of the Electronic Transactions Act in such a way that it would not be preempted by the Federal law.

Mr. BERMAN. I take it that bothered you because the California law has some of these low-income consumer protections that you are concerned about?

Ms. SAUNDERS. Yes, sir. That is exactly right.

There was also a significant change to section 6 of the bill, which has two important effects. One is that it require, whenever an electronic contract is made, when that contract would have been required to be made in writing in the physical world, that it must be provided to both parties in a form which can be retained by both parties and used in the future to prove its contents. In other words, it goes to the integrity issue that I was speaking about.

Mr. BERMAN. But UETA has that, as well.

Ms. SAUNDERS. No, sir, UETA does not require that each party be able to retain a document that is able to be used to prove its contents. If you are looking at section 12, I can show you.

Mr. BERMAN. I am looking at section 8. Where there is a requirement for a disclosure, "an electronic record is not capable of retention," and, by the way, must be capable of retention for it to be binding, "by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record." .

Ms. SAUNDERS. Yes, sir, it goes to that, but it does not go to the integrity of the document issue. It doesn't require that what the person receives be able to be offered in court to prove it.

Mr. BERMAN. There is a provision in the California law that addresses the integrity of the document issue better than you think UETA does.

Ms. SAUNDERS. I didn't know that. I'm sorry.

Ms. SARGENT. Mr. Berman, if I may, I don't believe that the California law has that in it. The California law is, in essence, the UETA without the sections that deal with transferrable records and without the sections that deal with governmental transactions, is my understanding.

Mr. BERMAN. Transferrable records?

Ms. SARGENT. Transferrable records—negotiable instruments, or checks, as we commonly think of them, checks or other negotiable instruments.

Mr. BERMAN. Not disclosure records, not——

Ms. SARGENT. No. When we talk about transferrable records, I am talking about a term of art. We are talking about chattel paper, checking——

Mr. BERMAN. It doesn't suspend banking—State or Federal banking regulations?

Ms. SARGENT. UETA does not.

Mr. BERMAN. Neither does California law. What does UETA do on transferrable——

Ms. SARGENT. It has some sections in it that could allow the development in some areas of the finance industry for transferrable electronic records, and there is a need for that. We heard the need for that.

UETA very clearly has sections in it that say, this is an enabling act, and very clearly if other laws and regulations control in an area, UETA does not in any way displace that substantive law.

Mr. BERMAN. Now, the manager's amendment does something in the context of integrity of the documents?

Ms. SAUNDERS. You see, the Federal law that passes this Congress on this issue will apply to all contracts until UETA is adopted.

Mr. BERMAN. Right.

Ms. SAUNDERS. So while I think or I wish that UETA also had that——

Mr. BERMAN. That is interesting.

Let me just interrupt. So this whole issue about whether UETA preempts State law, where we think the State law is better, depending on how you look at it, it depends how you want it to fall, really, unless you are truly devoted to principles of Federalism, and I have not yet found that person, other than Mr. Delahunt and myself.

Mr. DELAHUNT. Thank you, Mr. Berman.

Mr. BERMAN. But in other words, if the manager's amendment did more on integrity of documents than California law, then would you want a waiver of Federal law where a State has adopted UETA?

Ms. SAUNDERS. Yes, sir, in the hopes that the States will continue to adopt more careful consumer protections.

Mr. BERMAN. You are the only person.

Ms. SAUNDERS. For this reason, the California version of UETA also exempts most of the consumer protection laws from its coverage, that I would be concerned about.

Mr. BERMAN. I see. Okay.

Ms. SAUNDERS. But this Federal bill obviously does not.

There is a very important point here, and that is that when a business is in a business-to-business transaction, both parties have the capability of understanding the importance of maintaining the integrity of the document. But a consumer just receiving information over the Internet regarding a contract does not know on that day that he needs to be sure to store the document in a method that will allow him 2 years hence to produce it in court to prove the terms.

Mr. BERMAN. You could warn him as part of the—I mean, I talked with somebody over the weekend who was talking about this bill. They said that they find that there is more disclosure to consumers in some of these electronic commerce things than in any of those written contract things for buying costly appliances, automobiles; that—and I am sure this is not universal, but with some folks there are all these constant warnings and repeat things, and go back, do it again, are you sure you want it, do you know you are entitled to this, and all that. What is your impression?

Ms. SAUNDERS. Disclosure is generally a poor substitute, in my opinion, for substantive requirements. I think a much simpler substantive requirement should be that in consumer-to-merchant transactions, the merchant, who is the designer of the contract, should provide it to the consumer in a method that cannot be changed. The consumer could copy it to another record and then play with it, but that, essentially, would be provided as a read-only document.

Mr. BERMAN. Therefore, you cannot do that electronically, necessarily, because in some cases that person is not capable of receiving and downloading and printing an electronically delivered document?

Ms. SAUNDERS. I think that generally a consumer should be able to receive a read-only document. Most e-mails I believe are read-only documents, for example.

Mr. BERMAN. So then what are you asking for?

Ms. SAUNDERS. What we are saying and what the Senate manager's amendment says is that when a consumer or when any party to a transaction receives a contract electronically that would have required to be in writing, that they have to receive it in a method that they can then take and use it in court. What we intend for that to mean is that it comes in a read-only document, in a document that cannot be, by mistake, changed.

There was another significant change in the manager's amendment, I just want to note.

Mr. BERMAN. I have run out of time.

Mr. GOODLATTE. Go ahead. I am going to do another round.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you.

I am just trying to get this straight. My educational style is right after Mr. Berman spoke, so——

Mr. BERMAN. You are fast.

Mr. DELAHUNT. But I am quicker.

In terms of the manager's amendment—or let me ask first, does everyone on the panel support UETA?

Ms. SARGENT. I think it is assumed I do, so I will pass.

Mr. COOPER. Yes, we do.

Mr. PEYTON. Yes, Congressman, we want to see the States adopt it as soon as possible.

Ms. SAUNDERS. I would like to see some changes made to it, but basically we support the idea.

Mr. DELAHUNT. I was not here, but I think staff informed me it was said—it must be you, Judge Sargent—that 27 States have already introduced this?

Ms. SARGENT. They have not already introduced this, because many of these States, their legislatures are not in session now to introduce. But UETA has been adopted and enacted in California. We anticipate that in the next legislative session, whether that be before the end of this year or in early 2000, that it will be introduced in 27 States, and it is on the fast track.

The conference is pushing UETA. It is almost unanimously approved of. We have no real organized opposition. It is on the fast track with the conference. We anticipate or are thinking that it can be enacted in all our jurisdictions in a 2-to 3-year period, which is a very quick enactment period.

Mr. DELAHUNT. The reason I asked—and I posed that question to the earlier panel and you seemed to have a good grasp as far as the speed with which it can occur—I was trying to define how pressing the need is.

Mr. Cooper, you raised the issue of the international community defining the law or the body of law, if you will, as opposed to this Nation having influence over how to proceed in this e-commerce era. Is that the need?

Mr. COOPER. It is one of the most important needs. I think the difference in the debates going on about UETA and Federal legislation is minimal compared to the differences we see globally toward different approaches toward electronic signatures and electronic authentication.

Mr. DELAHUNT. I guess what you are saying is that it is important that this Nation pursue a national policy or be clear at least about the direction in which we are going to influence what occurs in terms of the global economy?

Mr. COOPER. That is right. In both the House and Senate bills, they address that and basically give the mandate to——

Mr. DELAHUNT. My question is, though, given the level of sophistication that exists presumably in the global economy, I am sure there is a recognition that UETA is moving, as Judge Sargent indicates, at an accelerated pace. I guess I am trying to be realistic here. There is a rumor that we may adjourn in the next 2, 3, or 4 weeks.

Mr. GOODLATTE. Five, 6, 7, or 8.

Mr. DELAHUNT. Yes. But a lot of Members really need to reflect and consider this. This is a first blush, if you will. I don't see this particular legislation receiving fast track priority, which presumably brings us into next March or April or May, at which time I

would think, I would surmise, that the major commercial centers in this country, those jurisdictions, those States within which they are situated, would be taking action on UETA.

I am just thinking out loud here in terms of the reality of what can be accomplished.

Mr. COOPER. I think a lot of it is the signals being sent. We were in somewhat the same situation last Congress with the Paperwork Elimination Act. There were desires by many to have that more expansive bill. As it turned out, the consensus was the bill that we passed, and we I think got a very good bill.

I was in Asia the last 2 weeks talking to the Japanese, talking to the Chinese. They are moving forward on their top-down authentication bills, though there is certainly an amount of time before we will see those implemented or used in the marketplace. They were very interested and not very knowledgeable when I described to them what could be done with the bill that was passed last year, not public law, on the government use of electronic signatures.

So I think while we in this country have our own internal debates and we are very caught up in them, the rest of the world is not necessarily aware that because States do certain things that that creates U.S. policy.

Mr. GOODLATTE. Thank you.

We have some votes on, and we probably have some additional questions that perhaps Mr. Delahunt and certainly Mr. Berman and I would like to ask. We will submit them to you in writing, and we would welcome your very quick response, because we are going to consider this promptly. At least in our subcommittee we will move promptly.

Mr. DELAHUNT. This certainly is not typical.

Mr. GOODLATTE. I would like to thank the witnesses for their testimony, and the subcommittee very much appreciates the contribution of each of you.

This concludes the hearing on H.R. 1714, the Electronic Signatures in Global and National Commerce E-sign Act. The record will remain open for 1 week, and we thank you all for your cooperation.

[Whereupon, at 12:07 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF ELECTRONIC FINANCIAL SERVICES COUNCIL

The Electronic Financial Services Council appreciates the opportunity to submit it's views concerning legislation that addresses the growing and important role of electric commerce in our society and more specifically addressed the delivery of financial services and products through electronic commerce. The Council represents a groups of financial services providers and software companies that offer their products and servicers (such as mortgages, insurance and securities) over the Internet. The Council's missions is to update laws and regulations to facilitate the electronic deliver of financial services. A list of Council members is attached.

Chairman Bliley and your Subcommittee, Mr. Chairman, are to be commended for your efforts in promoting the enactment of H.R. 1714 the "Electric Signatures in Global and National Commerce Act." This bill provides important and needed national standards to permit consumers and businesses to contract online. In addition, of particular importance to consumers to contract to receive related state and federal consumer financial disclosures online. This provision is wholly consistent with the actions of the Federal Reserve which recently issued proposed and interim rules to permit the delivery of federally mandated consumer disclosures electronically. It also compliments legislation introduced by Representatives Roukema, Lazio and Inslee, H.R. 2626, the provision of federally mandated consumer financial disclosers.

The Internet has rapidly transformed commercial activity, and industry experts believe that the growth of e-commerce has just begun. Access to computers and the Internet is raising in virtually every segment of the population. Statistics show that consumers are increasingly turning to the Internet for financial products. A recent study that consumers are increasingly turning to the Internet for financial products. A recent study by Forrester Research predicts that the number of households accessing financial services online will grow from 3.3 million current users to 20.9 million users in the next four years. A study of California homeowners looking to refinance showed that over 60% are already using the Internet to research products.

Electronic media will make it possible for consumer disclosures and other information to be provided faster, at a more cost effective rate, and in a more user friendly fashion than is possible in static power formats. Many believe that the Internet will level the playing field for providers of financial services (small banks and other financial institutions will have equal access to a national marketplace) and will empower consumers by providing enhance product information and access to a broader and more competitive credit marketplace. Online disclosers which facilitate the delivery of financial services and products electronically will provide consumers with significant benefits.

First among these benefits are convenience and time-saving. Consumers can conduct transactions virtually anywhere and at any time, 7-days-a-week, 24-hours-a-day. With disclosures being delivered over the world wide web or e-mail account, consumers will be able to access the web page or the e-mail account from any computer with standards Internet capabilities. Americans are flocking to personal computer for an ever-growing list of functions in their everyday lives. Allowing consumers to put this new technology to further use will give them the flexibility and choice they are insisting upon.

Secondly, electronic disclosure provides more "user friendly" information disclosures containing links to defined terms will make current consumer disclosures more understandable to consumers. For example, legalistic jargon in standard disclosure forms can be linked to plain-English definitions, making them much more readable. Electronic disclosures will also allow consumers to search documents for key words using browers and other technology. In addition, electronic storage of im-

portant mortgage disclosures will allow customers easier access than trying to find old paper disclosures.

Third, under-served persons and communities, both urban and rural, will be provided enhanced access to financial products and services, even where brick and mortar branches are not available. Libraries and schools can provide access to computers for an increasing number of urban and rural residents.

Finally, the provision of electronic disclosers could mean that consumers will benefit directly from the lower costs of doing business online than paper-based delivery, a reduction that marketplace competition would pass on to the consumer. Consumers who start and complete their loan applications over the Internet could save up to a quarter point on a $100,000 mortgage because of the lower overhead and hedging costs facing lenders.

The delivery of federal or state disclosures electronically will not in any way change the rights or responsibilities of any party or affect the content of any disclosure. Indeed, the electronic delivery of consumer notices, contracts, and disclosures will only enhance the effectiveness of existing consumer protection statutes by causing them to be provided in real time in a format that is far more user-friendly than the current stack of papers received by mail days after an application has been filed.

In closing, we urge the House of Representatives to reject the counsel of those who want to deny consumers the right to contract to receive disclosures electronic disclosures will empower and inform consumers who are increasingly choosing to use the Internet to access financial services

MEMBERS OF THE ELECTRONIC FINANCIAL SERVICES COUNCIL

Cendant Mortgage
Chase Manhattan Mortgage
Citigroup Mortgage, Inc.
Countrywide Home Loan , Inc.
E-Loan
The First American Fin:.cial Corporation
Freddie Mac
GE Capital Mortgage
GMAC Mortgage Corpoi ation
Intuit Inc.
Lender Services, Inc.
Lending Tree
Microsoft Corporation
The Principal Financial Group
United Guaranty
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PREPARED STATEMENT OF THE COALITION ON E-AUTHENTICATION

Mr. Chairman and members of the Subcommittee, the Coalition on Electronic Authentication ("CEA") includes many of the Nation's leading electronic commerce companies. We are dedicated to one goal: assisting in the enactment of the strongest possible electronic records and signatures legislation, as soon as possible. We welcome the opportunity to submit this statement for the record on H.R. 1714, the "Electronic Signatures in Global and National Commerce Act".

The importance of passing federal electronic records and signatures legislation as soon as possible cannot be overstated. We have attached, for your perusal, an article from the March 1, 1999, issue of *Legal Times*, which addresses the history behind the effort. Legislation in this arena, properly constructed, will have an immediate and dramatic impact on the growth of electronic commerce because it will create the legal certainty necessary to permit fully electronic transactions to be widely used by both businesses and consumers throughout the country. The use of electronic records and signatures, without the need to both wait and pay for the movement of paper, makes possible the seamless and efficient processing of customer transactions. It reduces both the cost and the time it takes to transact business. The benefit to consumers of lower transaction costs and time savings are obvious.

Eliminating uncertainties about electronic records and signatures will have the immediate effect of "jump-starting" electronic commerce transactions of all kinds. The so-called Digital Economy already is the growth engine behind our Nation's eco-

nomic boom. With federal electronic records and signatures legislation, the economy will be poised to grow at hyperspeed.

Our Coalition is gratified that the Congressional leadership in both Houses and both parties, as well as influential Members of both parties on electronic commerce issues, agree with our Coalition that electronic records and signatures legislation is needed immediately. We commend House Commerce Committee Chairman Tom Bliley and his Committee for their work in improving the electronic records and signatures legislation you are considering today. We also commend Senator Spencer Abraham for his dogged pursuit of a successful bill in the Senate, and Senate Commerce Committee Chairman John McCain for pushing Senator Abraham's electronic records and signatures legislation through his Committee.

We thank this Subcommittee and you personally, Mr. Chairman, for your desire to work with our Coalition to move electronic records and signatures legislation speedily through the Judiciary Committee. And, we want to thank Congressmen Bob Goodlatte and Rick Boucher, both Members of this Committee, whose involvement and interest on e-commerce issues has been essential to Congress' work in this crucial area of the economy. Messrs. Goodlatte and Boucher have been very supportive of strong electronic records and signatures legislation, and we thank them for their continuing work.

We urge the Subcommittee to follow up on the work done by the Commerce Committee, to approve HR 1714 and to send the bill to the House floor for adoption.

Congress agrees that electronic records and signatures legislation should be enacted speedily. The Administration also appears to support this type of legislation—it forwarded a Statement of Administration Position ("SAP") supporting similar legislation as it passed the Senate Commerce Committee. Curiously, there are reports that the Administration has raised some objections to the very bill that it supported publicly and in writing. Nevertheless, this should not deter Congress and this Committee from approving a strong and comprehensive electronic records and signatures bill this year.

The Administration certainly Tees that electronic records and signatures is a crucial building block of the Digital Economy. In his testimony before the House Commerce Committee on June 9, 1999, the Clinton Administration's witness, the Honorable Andrew J. Pincus, General Counsel of the Commerce Department, noted how quickly the Internet, and the electronic commerce it naturally spawns, is growing.

In early 1998, he observed, experts estimated that Internet retailing might reach $7 billion by next year. Now, Mr. Pincus continued, forecasters project on-line retail sales greater than $40 billion by 2002. Similarly, the Commerce Department also predicted a year ago that forecasters were then suggesting that electronic commerce might rise to $300 billion by 2002. Mr. Pincus now thinks that estimate was low, and has suggested that all electronic commerce (including business-to-business activity) may rise to $1.3 trillion by 2003. In short, predictions in this area consistently seem to be overtaken by reality. Electronic commerce, then, is rapidly transforming the commercial landscape as we know it, and it is doing so very quickly.

But, one might reasonably inquire, if so much business is already being successfully conducted online, why, then, is electronic records and signatures legislation necessary? The answer is a simple one. Businesses engaged in electronic commerce must have greater certainty that electron records and signatures will have the same legal effect as traditional paper documents and pen-and-ink signatures. In order to accomplish this goal, any legislation in this area also *must*, of necessity, embrace the following principles:

1. Uniformity;
2. Technology neutrality, and
3. Party autonomy

First, let us address the issue of uniformity. Modern commercial markets are national in scope and operation, and they involve transactions that are entirely interstate in nature. Our members conduct business in all fifty states, and we often have no idea where a customer with a laptop is accessing our systems. Consistent and uniform federal standards are therefore imperative if we are to engage in electronic commerce with any degree of certainty and reliability. Without it, the growth of electronic commerce will wither.

The reality is that the electronic commerce that is done today co-exists uneasily with a patchwork of state and federal laws that vary dramatically in both clarity and substance. Some laws and regulations remain silent on the validity and enforceability of electronic records and signatures. At the same time, the growing number of states that have addressed the issue have done so in widely disparate ways. For example, some states have only addressed the extent to which parties can use elec-

tronic records and signatures when they do business with the state itself. Other laws, such as Utah's Digital Signatures Act of 1996, address only the use of so-called "digital signatures," which are really a unique, technologically—specific form of security system. While digital signatures are one way to sign and verify the authenticity of an electronic record, they are only one method. Yet, by validating this particular form of electronic signature, the Utah law raises questions about whether arid when the many other, less costly forms of electronic signatures will be legally effective. We believe contracting parties should be able to decide for themselves what form of security they want to use without running the risk that the contracts they enter into will be deemed invalid.

One important effort to rectify the problem of conflicting state laws is manifested by the Uniform Electronic Transaction Act ("UETA"), sponsored by the National Conference of Commissioners on Uniform State Laws and presented to the states for their consideration this past July. CEA enthusiastically endorses this effort. However, there is no assurance that all or even a majority of states will adopt it, or that adoption will be achieved within a reasonable time frame. It is worth recalling, for example, that it took 9 years from (1958–1967) for the Uniform Commercial Code ("VCC") to be adopted nationally, and it took even longer for two jurisdictions, Louisiana and the District of Columbia, to endorse it. Very simply, the electronic commerce industry does not have the luxury of that kind of time. The electronic commerce industry needs federal "stop gap" legislation which bridges the current needs of the marketplace while the states consider and adopt the underlying principles of UETA, just as they did the UCC decades ago.

In its July 1, 1997, "Framework for Global Electronic Commerce," the Clinton Administration called for a "predictable, minimalist, consistent and simple legal environment for [electronic] commerce." The CEA wholeheartedly endorses this approach to legislation in this area: that is, enabling legislation that removes existing barriers to the use of, and reliance upon, electronic signatures, legislation which promotes uniformity and predictability. We believe in the creativity and innovation of the marketplace, and we see no need what's :)ever for legislation that over-regulates, attempts to resolve all open issues in this area onsets up new standards of regulatory regimes.

We do not see this as a time to rewrite Ihe common law of contracts to impose rules that have never existed in a pen and ink world.

What is needed is simple legislation that constructs an environment within which the market and its participants can develop the technologies and systems that work best for our various and wide ranging needs. Existing law does not establish minimum standards of security and liability for pen and ink signatures (for example, there are no minimum standards to make signatures harder to forge). Similarly, it seems to us, legislation in this area should not set minimum standards for electronic signatures. The market will quite naturally work this out, selecting the best technologies, balancing costs and risks, and inevitably reaching a result which is innovative and cost effective, both to the broker and the customer.

Accordingly, we would like to see a broad validation of electronic records and signatures, embodied in a law that enables market participants to choose for themselves which technology and which level of security and liability meets their individualized needs. We believe that the bill before you would do that.

Lastly, there is also the issue of foreign competitiveness. This is very important. No longer is commerce merely interstate in nature; it is fast becoming global. And foreign countries, particularly in the European Union, are rapidly allowing electronic records and signatures without a variety of conflicting intra-country rules and regulations. Thus, they facilitate commerce and the competitiveness of their companies. For the U.S. electronic commerce industry to compete in the world market, it needs a similar level uniformity and simplicity at home.

Moreover, in the Internet world developments occur at a dizzying pace. Often, the first at the door with a new standard or rule is able to win acceptance and influence the shape of later events simply by being first. For that reason, rapid passage of legislation before the E.U. issues its directive in the fall, is imperative. Congress and the Administration bear a large measure of responsibility, and through passage of legislation embodying these principles would deserve great credit, for ensuring that the U.S. vision of a self-regulating marketplace that does not discriminate for or against a specific technology or type or size of entity prevails as the model for electronic commerce in the future.

In sum, electronic records and signatures legislation, if it embraces the three essential principles we have discussed, will represent an historic step into the new century.

Uncertain Signatures

Resolve State Conflicts With Federal Electronic Authentication Law

BY THOMAS E. CROCKER

Electronic authentication, which provides certainty and knowledge about contracts and transactions, is key to the development of Internet commerce. During the past three years, states have started to regulate electronic authentication through a variety of legislative approaches. This patchwork quilt of differing state laws has created legal conflicts, sown confusion in the marketplace, and may jeopardize U.S. competitiveness in electronic commerce. Although efforts have begun to develop uniform state law, this process may take too long for an industry marked by rapid technological change and compelling marketplace demands.

What the electronic commerce industry needs is limited, interim relief through federal baseline legislation. There have been widespread requests from within the industry for Congress to enact legislation that would provide legal recognition to electronic authentication and pre-empt conflicting state laws. Congress considered but failed to enact such legislation last session. However, it is quite likely that a consensus bill will emerge this session that both Congress and the Clinton administration should support.

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Electronic authentication is a cryptographic or other electronic technique that allows the user to: (1) authenticate the identity or information associated with a sender of a document; (2) determine that a document was not altered, changed, or modified during transmission; and (3) verify that the document received was the one sent by the sender. Electronic authentication based on public key cryptography is accomplished through issuance of a "certificate." A certificate is a computer-based record that includes the identity of the certificates authority (CA) issuing it, the name of its subscriber, and the subscriber's public key.

Electronic authentication can utilize various technologies, from PIN numbers to passwords to the evolving biometric technology that involves fingerprints, signature dynamics, or retinal scans. The most widely accepted form of electronic authentication currently is based on cryptographic processes, such as digital signatures, which involve mathematical formulas. However, the technology of choice could change in the future, and thus any legislation in this area should have "technology neutrality."

A federal approach to electronic authentication is needed to help U.S. companies keep up with foreign competitors. In many foreign nations, particularly those in the European Union, electronic authentication is not subject to conflicting bureaucracy regulation. This uniformity facilitates the governmental competitiveness of these foreign financial institutions and companies. On Jan. 8, 1997, the EU released a paper, "Towards a European Framework for Digital Signatures and Encryption," highlighting the need to establish an EU-wide approach to electronic authentication. To compete meaningfully in the world market, the U.S. financial services industry and other e-commerce participants need comparable uniformity and simplicity at home.

COMPLIANCE ROADBLOCKS

As of Jan. 31, 1999, some 43 U.S. states had enacted legislation to regulate electronic authentication. No two of these state laws are precisely alike. Even those laws that are based on the same model contain differences that present a compliance nightmare for electronic commerce participants, who operate in all 50 states (as well as internationally) through the Internet.

State laws tend to come in one of two forms: "thick" or "thin." The model for the "thick" approach is Utah's Digital Signature Act of 1996, which addresses use of digital signatures by the general public and expressly regulates CAs through various systems of registration, licensing, and payment of fees. On the other hand, a law adopting the "thin" approach might merely give legal recognition and effect to electronic authentication or register only transactions with the state government. An example of the "thin" approach would be the Florida Electronic Signature Act of 1996.

Beyond these two basic formats, state laws vary widely regarding such matters as registration of CAs and the minimal technical and technological attributes of digital certificates. Other areas of divergence include the treatment of licensed and unlicensed CAs; whether to impose fines on CAs (and how much); the suspension of certificates; the extent of a CA's liability for erroneous certification; whether a person who receives a message sent with a digital signature must actively agree to use of the electronic form; and the definitions of such basic terms as "certificate," "digital signature," "message," and "accept a certificate."

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has various initiatives under way to harmonize state electronic commerce laws, including revisions to Article 2 of the Uniform Commercial Code, the development of a new UCC Article 2B, and the drafting of a model Uniform Electronic Transactions Act. Once NCCUSL has completed model legislation, it typically takes at least several years for states to enact the proposed law. Many electronic commerce participants believe that this effort to harmonize state laws will take too long to provide the immediate relief needed.

As an alternative to uniform state legislation, Congress has actively considered federal legislation to provide recognition and effect to electronic authentication and pre-empt conflicting state laws.

During the last session, Congress considered three primary bills on electronic authentication. The first bill, the Digital Signature and Electronic Authentication Law, S. 1594, was introduced by Sen. Robert Bennett (R-Utah) on Feb. 2, 1998. This bill was supported by the Ad Hoc Committee for Electronic Authentication, which consists of financial institutions, trade associations, and merchant service providers. S. 1594 took a relatively modest approach. It provided for recognition and effect for electronic authentication and pre-empted conflicting state laws, without imposing any new bureaucracies, licensing schemes, or self-regulatory organizations.

However, critics of the bill, including the Clinton administration, contended that it was premature and "bank-centric," given its support by financial institutions. Because of this opposition, S. 1594 was not reported out of the Senate Banking Committee before the end of the session.

The second significant electronic authentication bill was the Electronic Financial Services Efficiency Act of 1997, H.R. 1937, introduced by Reps. Richard Baker (R-La.) and David Dreier

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We urge the Members of this Committee to recognize and act favorably on legislation that reflects these goals. thank you for the opportunity to submit this statement to you today.

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(R-Calif.) Nov. 7, 1997. This bill was supported by the Electronic Commerce Forum, a Washington-based trade group with both banking and nonbanking participants.

H.R. 2937 would have imposed a mandatory licensing regime for CAs and would have barred CAs that did not comply with that regime. Moreover, it would have established three separate layers of bureaucratic control over CAs, including a mandatory self-regulatory organization called the National Association of Certification Authorities. The legislation would have established elaborate procedures governing disciplinary actions.

Critics of H.R. 2937 contended that it did not clearly pre-empt conflicting state laws. They also argued that the bill was contrary to the Clinton administration's global information infrastructure policy, which mandates that the government should avoid "undue restrictions on electronic commerce." This bill also died in committee.

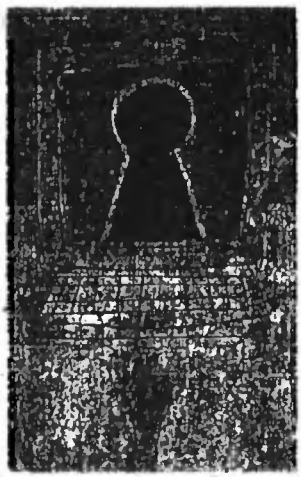
In addition to the above two measures, Reps. Anna Eshoo (D-Calif.) and W.J. Tauzin (R-La.) introduced H.R. 2991, the Electronic Commerce Enforcement Act of 1997, on Nov. 9, 1997. This bill, governing the use of electronic authentication in dealings with the federal government, was later folded into the Government Paperwork Elimination Act, introduced by Sen. Spencer Abraham (R-Mich.), and was eventually enacted in a significantly modified form as an amendment to the Internet Tax Freedom Act. This measure, however, is limited in scope. Within 18 months of enactment, the Office of Management and Budget is required to develop procedures for the use and acceptance of electronic signatures by the executive branch of the federal government. Within five years of enactment, federal executive agencies are required to allow electronic submissions and disclosures of information "when practicable" and accept electronic signatures "when practicable." The act also provides for the "legal effect, validity, or enforceability" of electronic records and authentication deployed under its provisions.

The Government Paperwork Elimination Act, though limited in scope, established a precedent and has encouraged Congress to tackle again the persistent problem of conflicting state laws. The advocates of this federal legislation learned during the last session of Congress the importance of seeking a minimalist, nonbureaucratic, and technology-neutral solution supported by a broad coalition of industries.

Discussions are currently under way between groups of e-commerce participants, state officials, and lawmakers in both the Senate and House to push for broader legislation that gives recognition and effect to electronic authentication and provides a baseline standard on which e-commerce companies can rely until uniform state law measures take effect. Such legislation will be a boon for U.S. competitiveness in e-commerce.

Both Congress and the administration should seek a uniform legal framework to facilitate electronic commerce in the United States and to enhance U.S. competitiveness abroad. Narrowly drawn federal legislation that allows parties to govern their dealings by contract to the maximum extent possible—while imposing no new bureaucracies or licensing schemes—would appear to be the most sensible approach. Such legislation would be consistent with both the Clinton administration's global information infrastructure policy and the prevailing philosophy in Congress. This would be "win-win" legislation for all parties. ■

Broader federal legislation that addresses electronic authentication will be a boon for U.S. competitiveness.



ISBN 0-16-060280-7
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